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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1985

JOHN JACKSON,
Petitioner,

vs.

PEPSI-COLA BOTTLERS OF TOLEDO, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTION PRESENTED FOR REVIEW

Did the Sixth Circuit Court of Appeals misapply the "clearly erroneous" standard in reviewing the decision of the trial Court?

PARTIES BELOW

Pepsi-Cola Bottlers of Toledo, Inc. is the successor in interest to RKO Bottlers of Toledo, Inc.

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No.

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JOHN JACKSON,
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PEPSI-COLA BOTTLERS OF TOLEDO, INC.,
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PETITION FOR WRIT OF CERTIORARI
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For the Sixth Circuit

OPINION BELOW

The Sixth Circuit Court of Appeals entered its decision affirming the decision of the District Court which granted judgment to Respondent and against Petitioner on all of Petitioner's causes of action.

JURISDICTIONAL STATEMENT

Petitioner's original complaint was brought against Respondent for violations of the Thirteenth Amendment of the Constitution of the United States, and Title 28 U.S.C. §§ 1331, 1343(3), 2201, 2202, and Title 42 U.S.C. §§ 1981 and 1988. Jurisdiction was invoked under those sections.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provisions involved in the within case are the Thirteenth Amendment of the Constitution of the United States and Title 28 U.S.C. §§ 1331, 1343(3), 2201, 2202 and Title 42 U.S.C. §§ 1981 and 1988.

The Thirteenth Amendment of the Constitution of the United States which states:

Section I

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

Section II

> Congress shall have power to enforce this article by appropriate legislation.

The statutes involved can be found in the Appendix at p. A68.

STATEMENT OF THE CASE

On February 10, 1986, a panel of the Sixth Circuit Court of Appeals affirmed the decision of the United States District Court for the Northern District of Ohio, Western Division, dismissing Petitioner's causes of action against Respondent.

After a trial on the merits, the District Court granted judgment for Respondent, finding that Petitioner had failed to prove a prima facie case for either racial discrimination

in promotion or for retaliation in discharge for the filing of a claim of discrimination with the proper agency.

Upon appeal to the Sixth Circuit, the case was remanded with decision that the trial court's findings that Petitioner had failed to prove a prima facie case based upon the evidence adduced and the applicable law was "clearly erroneous", particularly in the trial court's failure to even find the Petitioner had made out a prima facie case for either of his propositions.

The trial court, after remand, subsequently found that Petitioner had made a prima facie case for his charges of discrimination and retaliatory termination, but subsequently found that Respondent had adequately rebutted those charges by showing that the discharge had not been pretextual, this without additional testimony and evidence, and in spite of the Court of Appeals having found earlier that the trial court's prior decision in that regard, given the facts, was "clearly erroneous".

On subsequent appeal, the trial court was affirmed.

REASONS FOR GRANTING THE WRIT

1. To determine whether or not the Sixth Circuit has properly applied the "clearly erroneous" standard as enunciated by this Court. *Anderson v. Bessemer City*, 470 U.S. .....

2. To exercise the powers of supervision of this Court where the Sixth Circuit has sanctioned a departure from the accepted and usual course of judicial proceedings.

These reasons are stated pursuant to Rule 17 of the Supreme Court Rules.

DISCUSSION

There seems to be a question raised in the instant case regarding the application of the criteria used by the Sixth Circuit in determining what constitutes a "clearly erroneous" decision. In its initial presentation to the Court of Appeals, that Court determined that the decision of the trial court, that Petitioner had failed to prove a prima facie case, and the trial court's characterization of the facts based upon the testimony was "clearly erroneous", and remanded the case to the trial court.

Upon a subsequent finding that the Petitioner had established a prima facie case, the District Court upon the same facts, again dismissed the action.

The Sixth Circuit also reviewing the same facts and result which it had earlier determined were "clearly erroneous", subsequently found both the Court's characterization and decision appropriate to affirm.

The subsequent decision made after remand from the Court of Appeals, was different only in that the trial court found that Petitioner had made a prima facie case to support his proposition that he had been discriminated against on the basis of race.

The fact that the Court of Appeals in the first instance can find a decision "clearly erroneous" and a subsequent decision, similar in kind to the first and based upon the same facts not to be so, can only lead to the conclusion that there are no objective criteria being followed, as this court has enumerated thru *Anderson v. Bessemer City.*

Since there is apparently no standard being followed by all courts, the Supreme Court should set the proper standard for review.

Additionally, after the remand, Petitioner moved the Court to allow the introduction of newly discovered evidence. The trial court refused to do so, and the Sixth Circuit did not even address the issue.

CONCLUSION

The Court of Appeals for the Sixth Circuit has clearly misapplied the "clearly erroneous" standard of review in affirming the second opinion of the District Court, clearly indicating that the standard applied is ambiguous at best, and certainly not in conformity with *Anderson v. Bessemer City* as enunciated by this court.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed February 10, 1986)

No. 85-3232

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN JACKSON,
Plaintiff-Appellant,

vs.

PEPSI-COLA, DR. PEPPER BOTTLING CO.,
a division of RKO BOTTLERS OF TOLEDO, INC.,
Defendant-Appellee.

ON APPEAL from the United States District Court
for the Northern District of Ohio,
Western Division
[40 F.E.P. Cases 222]

CIVIL RIGHTS ACT OF 1964

1. Race—Promotion 108.3178

Finding that white employee's overall breadth of experience made him more qualified than black former employee for promotion to plant superintendent is not clearly erroneous.

2. Retaliation—Pretext 108.4505 108.7338

Employer discharged black employee not in retaliation for his discrimination charges but because he assaulted

hourly employee in its parking lot after having previously been warned that "laying hands" on an hourly employee would result in his termination, and while he contends that manager's query to female employee to "think over" her decision not to lodge sexual harassment complaint against him indicates bad faith on employer's part, had it wanted to discharge him, it would simply have done so without any "set up" that would possibly subject it to sexual harassment suit and adverse publicity; passage of over one year from time he filed Title VII action to time of his discharge militates against finding of retaliation.

Before KEITH and MILBURN, *Circuit Judges,* and UNTHANK,* *District Judge.*

KEITH, *Circuit Judge:*—Appellant John Jackson, a black male, appeals from a judgment in favor of RKO Bottlers in this Title VII discrimination case tried without a jury by Judge Potter. This Court previously heard this case, Jackson v. RKO Bottlers of Toledo, 743 F.2d 370, 35 FEP Cases 1318 (6th Cir. 1984), and remanded on the basis that the district court erroneously concluded that plaintiff had not established a prima facie case pursuant to McDonnell-Douglas Corporation v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973). Specifically, the trial court erroneously found that plaintiff had not proved he was qualified for the job of plant superintendent. Plaintiff claims he was not promoted to plant superintendent due to racial discrimination, and that he was unlawfully discharged on December 1, 1980, in retaliation for his having filed discrimination charges. Plaintiff originally filed his lawsuit November 15, 1978.

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*Honorable G. Wix Unthank, U.S. District Court for the Eastern District of Kentucky, sitting by designation.

On remand the trial court accepted plaintiff's prima facie case. Nevertheless, the court determined plaintiff could not prevail because there were legitimate, nonpretextual reasons, proffered by RKO, which adequately explain why he was not promoted. Furthermore, the district court found plaintiff was discharged not in retaliation for filing discrimination charges, but for "assaulting" an hourly employee in the parking lot after previously being warned that such action would result in his termination. We affirm, finding the decision below rendered by Judge Potter was not clearly erroneous.

I. THE PROMOTION ISSUE

The appellant, John Jackson, began working for the predecessor of RKO Bottlers, Variety Club Beverage Company, of Toledo, Ohio, as a laborer in 1951. In 1966, the Variety Club Beverage Company was purchased by RKO for bottling and distributing Pepsi Cola. The plant superintendent at that time was Daniel Starsky. The general sales manager was Robert Johnson. Following the purchase, a decision was made by RKO to build a new bottling and distribution facility, known as "Hill Avenue".

In early 1978, Starsky, the plant superintendent, was offered the position of managing the RKO Bottling facility in Muncie, Indiana, and Johnson was faced with a decision as to the future operating method of the Toledo facility. The stage was thus set for the crux of plaintiff's complaint: why was he not promoted to plant superintendent? Plaintiff claims it was due to impermissible racial discrimination. We disagree.

Originally, Johnson decided to employ a "team management" concept, rather than use a plant superintendent.

This system is frequently used within the bottling industry, and is used by the Pepsi-Cola Bottling Group. There is conflicting evidence as to whether the "team concept" was a contest to see which of three individuals, Kerner, a white, Jackson or Taylor, would succeed Starsky as plant superintendent. However, the system did not work, and Johnson decided to return to a plant supervisor system. The choice for plant supervisor came down to Jackson or Kerner, although Mr. Taylor was given slight consideration.

The district court found that Johnson was familiar with Kerner because they had worked together at the Variety Club prior to the opening of the Hill Avenue facility, and he knew Kerner's achievements and responsibilities as a warehouse supervisor at Hill Avenue. Johnson was also aware of Jackson's duties and responsibilities at the Variety Club and had a great deal of contact with Jackson between 1969 and 1978.

The evidence as to who would have made the better plant superintendent, Jackson or Kerner, was conflicting. Johnson felt that Kerner was the more qualified to be plant superintendent because he was experienced in all phrases [sic] of the business. Kerner was experienced in warehousing and had straightened out the warehousing situation after being brought to Hill Avenue from Variety Club. He had sales experience, which Johnson felt was important to understanding the total scope of the operation. Kerner had successfully run the complex Variety Club operation where he had responsibility for production, warehousing, and quality control.

In contrast, Jackson had little or no involvement in quality control at Variety Club, and no direct involvement at Hill Avenue. During the period of time that Kerner

was running the entire Variety Club operation, Jackson was running merely one line at Hill Avenue. Jackson had no night warehousing experience, and he had no sales experience. Jackson had also been criticized on occasion for his handling of employees on a day-to-day basis. He was not familiar with stock ordering, forecasts, or budgets. Johnson also felt that, during the "team concept" period of management, Jackson was trying to operate production in the same manner as Starsky, and Johnson did not wish that type of management to continue.

Although Starsky testified that he would have made Jackson plant superintendent had the decision been his, this decision was based primarily on Jackson's personal loyalty to Starsky. Even Starsky believed Kerner had more total experience in running the plant operations. The district court found that Johnson's decision to promote Kerner over Jackson was based on Kerner's overall greater experience in the bottling industry, and that racial animus did not play a part in the promotion decision.

II. THE RETALIATORY DISCHARGE ISSUE

In 1976 an incident occurred between an hourly employee, McGee, and Jackson, who was a supervisor at that time. Jackson had given McGee instructions and McGee started swearing at him. When McGee approached Jackson, Jackson grabbed McGee and pushed him away. This incident was observed by John McCullum, who was a union steward. McCullum brought the incident to the attention of Bob Johnson, who at that time was general manager. Johnson spoke to both McGee and Jackson in McCullum's presence, and heard their versions of what had occurred. Johnson told McGee that he was wrong for swearing at Jackson, and told Jackson that if he ever

laid hands on another hourly employee, he would be fired. In May of 1979 Jackson grabbed the shoulders of a female production employee, Carol Cowell, as if to kiss her, and, later that day when the same employee requested that Jackson sign her time card, Jackson responded "for a little sugar, anything can be done around here." This incident was brought to Johnson's attention, and he called Ms. Cowell to his office. Johnson asked Ms. Cowell if she wished to sign a complaint against Jackson, and she indicated no. Johnson told Cowell to think about her decision for a few days. Subsequently, Ms. Cowell told Johnson that Jackson had apologized to her and that she wanted to drop the matter and forget it. Johnson did not pursue the matter further. Jackson argues that Johnson's query to Ms. Cowell to "think over" her decision not to lodge a complaint, indicates that RKO was out to "get him" in retaliation for his filing suit.

In November of 1980 the RKO facility was involved in a bitter labor dispute. On Saturday, November 22, 1980, the day after the strike ended, Frank Taylor, Robert Haas, an hourly paid maintenance mechanic, and another employee had ridden to work together. The television sets were set up in the plant so that the personnel could watch the Ohio State-Michigan football game. On previous occasions Haas and Jackson had bet with each other on football games. When Haas lost a bet it was his practice to pay Jackson the following Monday, and Jackson testified that he never had any concern about Haas paying on his bets. That Saturday Haas and Jackson discussed betting on the game, but Jackson wanted Michigan and points and Haas refused to bet.

At the end of the day and after the conclusion of the game, when Haas, Taylor and another employee were

leaving the plant, Jackson asked Haas for $5.00 on his bet. Haas replied that they didn't have a bet and continued out of the plant. As the three got to Haas' car, Jackson came out of the plant hurriedly and again yelled to Haas "Where is my $5.00?" Haas again replied that he didn't have his $5.00 and that they did not have a bet. Jackson ran up to Haas and twice pushed his hand away from the lock as Haas was trying to open the car door. Jackson had Haas pinned against the side of the car with his body. Jackson then grabbed Haas in the chest area and spun him across one or two parking spaces and then pinned him up against another car. Taylor asked Jackson to let Haas go and also motioned for three security guards, who were sitting in a vehicle across the parking lot, to come over. As the guards approached, Taylor again asked Jackson to let go of Haas and Jackson then complied. Although Jackson considered this incident mere "horseplay," Haas did not, and the incident was reported to Johnson.

The following Monday, Johnson spoke individually with Taylor, Haas and Jackson. He also spoke with one of the guards and requested and read the reports of the other two guards concerning the incident in the parking lot. Jackson told Johnson that the incident had been in fun, but both Haas and Taylor told Johnson that they felt that Jackson had been serious. Johnson concluded that the incident was not mere "horseplay," and that it had broken all the rules of good supervisory procedure since supervisors were expected to set an example for the rest of the plant community. Johnson had previously discussed with his supervisory personnel that any physical contact with an hourly employee was absolutely forbidden. Jackson had been previously warned, after the McGee incident, that he would be fired if he again laid hands

on an hourly employee. On December 1, 1980 Jackson was fired because of the incident in the parking lot.

DISCUSSION

[1] In Title VII cases, plaintiff carries the ultimate burden of proving racial discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253, 25 FEP Cases 113. Once the plaintiff has proved his prima facie case of racial discrimination under McDonnell-Douglas Corporation v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973),[1] the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the plaintiff's rejection. The plaintiff then has an opportunity to prove that these "legitimate" reasons were mere pretext. Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 253. In the instant case, plaintiff proved his prima facie case regarding the promotion to plant superintendent. The defendant articulated legitimate, nondiscriminatory reasons for not promoting plaintiff. Namely, Kerner was more qualified for the position due to his overall breadth of experience. This finding of fact was not clearly erroneous. Plaintiff failed to prove that the reasons articulated by defendant were pretextual. Accordingly, we affirm the district court's holding in favor of RKO.

[2] Plaintiff, likewise, does not prevail on his claim of retaliatory discharge. To establish a prima facie claim

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1. Under McDonnell-Douglas, to prove a prima facie case of racial discrimination, plaintiff must show: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that despite his qualifications, he was rejected; and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802.

of retaliatory discharge, plaintiff must establish: (1) that he engaged in protected opposition to Title VII discrimination or participated in a Title VII proceeding; (2) that he was subject to adverse employment action subsequent to or contemporaneous with his protected activity; (3) there is a causal connection between the protected activity and the adverse employment action. Burrus v. United Telephone Co. of Kansas, Inc., 683 F.2d 339, 343, 29 FEP Cases 663 (10th Cir. 1982), cert. denied, 459 U.S. 1071, 30 FEP Cases 592 (1982). If a prima facie case is established, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse action. The plaintiff may rebut defendant's "legitimate" action by demonstrating the articulated reason was a mere pretext for discrimination. Id. at 343. Even assuming plaintiff has established a prima facie case, defendant prevails for it has proffered legitimate, non-discriminatory reasons for discharge. Namely, the incident in the parking lot with Haas after previously being warned that "laying hands" on an hourly employee would result in his termination. Plaintiff has failed to produce any credible evidence that this legitimate reason for his termination was mere pretext. Plaintiff claims that Johnson's query to Ms. Cowell to "think over" her decision not to lodge a complaint against Jackson indicates "bad faith" on RKO's part, and is indicative of pretext. We disagree. Logic dictates that if RKO wanted to fire Jackson, they would have simply done so without any "set up" which would possibly subject RKO to a sexual harrassment suit and adverse publicity. Furthermore, the time span of over one year from the time Johnson filed suit, to the time of his firing, militates against a finding of retaliatory discharge.

Accordingly, we affirm the decision of Judge John W. Potter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT

(Filed February 27, 1985)

Case No. C 78-549

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN JACKSON,
Plaintiff,

vs.

RKO BOTTLERS OF TOLEDO, INC.,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

POTTER, *J.*:

This matter is before the Court on remand from the United States Court of Appeals for the Sixth Circuit for further proceedings consistent with its opinion in *Jackson v. RKO Bottlers of Toledo, Inc.*, No. 82-3803, slip. op. (6th Cir. August 30, 1984).

This cause was originally tried to the Court, and this Court made findings of fact and conclusions of law. The opinion of the Court of Appeals contains a statement of the facts. The Court of Appeals found certain findings by this Court to be clearly erroneous. The Court of Appeals found that plaintiff established a prima facie case of discriminatory denial of promotion. It also found that he established a prima facie case of retaliatory discharge

and that he raised a factual question concerning whether the defendant's stated reason for plaintiff's termination was pretextual. The Court of Appeals stated that this Court's findings as to pretext may have been influenced by this Court's erroneous findings as to the prima facie case. The Court of Appeals also found that plaintiff's evidence of intent to discriminate was sufficient to establish his prima facie evidentiary burden with respect to his 42 U.S.C. §1981 claim.

This Court did not dismiss plaintiff's Title VII or 42 U.S.C. §1981 claims at the end of plaintiff's evidence; rather. the Court conducted a full trial. Plaintiff had his day in court pursuant to *Trans World Airlines, Inc. v. Thurston,* 53 U.S.L.W. 4024, 4026 (U.S. January 8, 1985); *see also Weems v. Ball Metal & Chemical Division, Inc.,* No. 83-554, slip op. at 3-4, n.2 (6th Cir. February 4, 1985). Therein the court stated:

> in [*U.S. Postal Service Board of Governors v. Aikens,* 460 U.S. 711 (1983)], the Court, interpreting *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), held that if a trial judge denied defendant's motion for dismissal after completion of plaintiff's case-in-chief on the ground that plaintiff made a prima facie case and if defendant offers evidence in support of nondiscriminatory reasons for its action, the *Burdine* presumption "drops from the case" and "the factual inquiry proceeds to a new level of specificity. *Aikens,* 75 L.Ed.2d at 410. The question then becomes for the trial judge, *Aikens* holds, whether plaintiff has carried the burden of persuasion of showing intentional discrimination, as would be true in other civil litigation.

Pursuant to the remand, this Court now makes its findings of fact and conclusions of law.

Findings of Fact

Pursuant to the Court of Appeals' opinion and findings, this Court finds that plaintiff has made a prima facie case for his Title VII claims of discriminatory denial of promotion and retaliatory discharge and for his 42 U.S.C. §1981 claim. The Court finds that the following findings are pertinent to the issue of pretext and plaintiff's ultimate burden of proving racial discrimination in defendant's refusal to promote and in defendant's decision to fire him.

1. Plaintiff, a black man, began work as a general laborer with Variety Club Beverage Company (Variety Club) on April 1, 1951. In 1966 defendant RKO Bottlers of Toledo, Inc. (RKO) purchased Variety Club including the franchise for bottling and distributing Pepsi-Cola.

2. When Variety Club was purchased by RKO in 1966, James Snyder became general manager, Daniel Starsky was the plant superintendent, and the general sales manager was Robert Johnson.

3. Following the purchase of Variety Club, a decision was made by RKO to build a new bottling and distribution facility, hereinafter known as "Hill Avenue." The new facility opened in June, 1969, and RKO operations were split thereafter into two parts, with the Variety Club operation continuing to produce flavored drinks while Hill Avenue produced only Pepsi-Cola.

4. Prior to the opening of Hill Avenue in 1969, plaintiff was a laborer with no supervisory authority, no warehousing experience other than the physical loading of trucks, and limited quality control experience.

5. Another employee of RKO, Pete Kerner, began his career as a truck loader for Joe Lyn Beverage Com-

pany, predecessor to Variety Club, when he was 12 years old. Kerner became a route salesman for approximately nine years, and then moved to the position of head checker-supervisor for the Pepsi-Cola Division of Variety Club. Following the purchase of Variety Club by RKO, Kerner accepted a position with a Pepsi-Cola bottler in Flint, Michigan. In 1966, on the recommendation of Daniel Starsky, the plant superintendent, Kerner was brought back to RKO, after some months in Flint, as assistant plant superintendent.

6. Daniel Starsky went to the Hill Avenue facility when it opened in June of 1969, and Pete Kerner was made plant superintendent of Variety Club. Although Starsky gave Kerner some guidance, he visited the Variety Club plant infrequently, and Kerner was essentially in control of the production and warehousing aspects of Variety Club.

7. Plaintiff went to Hill Avenue in 1969 as a working line foreman. Daniel Starsky did not believe that Jackson was qualified to run the Variety Club operation on his own.

8. At Hill Avenue, Jackson was responsible for one production line until 1972 when a second line was added. From 1972 to 1974 Jackson was in charge of two lines and had responsibility for bottle sorting on one line. During that period Jackson had no responsibility for quality control, which was supervised by John Turner, and he had no responsibility for the night warehousing operation. The plant was run by Starsky, and Jackson had no degree of independence of action or judgment.

9. In supervising the Variety Club operation, Pete Kerner had responsibility for production, warehousing, and quality control from 1969 to 1972. Kerner attended

a Pepsi-Cola quality control school in 1978, and Variety Club won the Hires Root Beer quality control award every year until the operation closed down. Kerner did all purchasing except Pepsi concentrate. Kerner performed well in any position that he was placed in and, in the estimation of his superiors, did a fine job at Variety Club.

10. The Variety Club operation was the more difficult of the two operations. The Variety Club facility was obsolete, and the equipment was antiquated. Kerner cleaned up and modernized Variety Club. The fact that Variety Club bottled numerous flavors necessitated frequent changeovers, often on an hourly basis. The brands also required different packaging, and quality control was more difficult.

11. When the Variety Club bottling operation was shut down in 1972, Kerner became night warehouse supervisor at the Hill Avenue facility. As warehouse supervisor, Kerner also directed any night bottling production that took place.

12. In 1974, John Jackson was made a production supervisor, a salaried position. From 1974 to 1978, he oversaw the bottling lines and the bottler sorters, but Dan Starsky remained in charge of production.

13. John Jackson did not have responsibility or supervisory authority over quality control, and he did not, in the normal course of his activities, handle ordering or scheduling. Jackson's duties included two bottling lines, bottle sorting, scheduling of personnel, keeping track of absenteeism, filling out daily reports, and taking inventory. Starsky, however, essentially ran a one-man operation, and even when he was absent he left detailed instructions

for Jackson to follow. During this period of time Jackson did not exercise independence of action or judgment.

14. In 1976 an incident occurred between an hourly employee named McGee and John Jackson, who was a salaried supervisor at that time. Jackson had given McGee instructions, and McGee started swearing at him. Jackson grabbed McGee and pushed him. The incident was observed by John McCollum, a union steward. McCollum brought the incident to the attention of Bob Johnson, who was general manager. Johnson spoke to both McGee and Jackson in McCollum's presence and heard their versions of what had occurred. Johnson told McGee that he was wrong for swearing at Jackson and told Jackson that if he ever laid hands on another hourly employee he would be terminated.

15. In early 1978 Starsky was offered the position of managing the RKO Bottling facility in Muncie, Indiana, and Johnson, as general manager, was faced with the decision as to the future operating method of the Toledo facility. Johnson decided, in April, 1978, to go to a "team management" concept. That system is used within the bottling industry and is used by the Pepsi-Cola bottling group.

16. Johnson felt that Starsky's method of "one-man" operation had caused problems. Starsky was a strong-willed individualist who did not listen to advise. He only delegated minor authority and apparently did not believe in long-term planning. Starsky tended to keep everything in his head. Johnson did not want the plant operated in that fashion since he felt that Starsky's method had cost sales and caused interruption of loading patterns.

17. When Starsky left, Johnson felt he had to get a handle on the whole operation, and he felt the best way

to do that was to use the team management concept and break up Starsky's authority into three areas. He decided to put Kerner in charge of warehousing, Jackson in charge of production, and Frank Taylor in charge of maintenance. The three were paid equally and were to function as a team. The three had equal responsibility.

18. After two months, however, Johnson did not believe that the operation was running smoothly under the team concept of management, and, since they were entering into their busiest season, Johnson felt that he had to return to a plant supervisor system.

19. The operation of the facility under the team concept was not a test or contest to see which of the three individuals would succeed Starsky as plant superintendent.

20. Johnson's choice came down to a decision between Kerner and Jackson because Taylor, although given some consideration because of his fast learning ability, had no experience in production or warehousing.

21. Johnson was familiar with Kerner because they had worked together at Variety Club prior to the opening of the Hill Avenue facility, and he knew Kerner's achievements and his responsibilities as warehouse supervisor at Hill Avenue. He was also aware of Jackson's duties and responsibilities at Variety Club and had a great deal of contact with Jackson between 1969 and 1978. Because of the relatively small size of the operation, Johnson was aware of who did what.

22. It was the company's policy to promote from within the organization whenever possible. While Johnson had no written guidelines for supervisory promotion, the primary criterion was work experience. In filling the

position of plant superintendent, Johnson was looking for someone who had overall experience in the bottling industry, including production, quality control, night warehousing, and sales. He was also looking for someone qualified to supervise a relatively large group of people.

23. Johnson felt that Kerner was the more qualified to be plant superintendent because he was experienced in all phases of the business and could look at the total concept. Kerner was experienced in warehousing, and, indeed, had straightened out the warehousing situation after being brought to Hill Avenue from Variety Club. He had sales experience, which Johnson felt was important to understanding the total scope of the operation. Kerner had supervised and had had direct involvement in quality control at Variety Club. Kerner, moreover, had successfully run the difficult Variety Club operation where he had responsibility for production, warehousing, and quality control.

24. Jackson, on the other hand, had had little or no involvement in quality control at Variety Club, other than what could be performed by any filler operator, and no direct involvement at Hill Avenue. During the period of time that Kerner was running the entire Variety Club operation, Jackson was running one line at Hill Avenue. Jackson had no night warehousing experience, and he had no sales experience. Jackson had also been criticized on occasion for his handling of employees on a day-to-day basis. He was not familiar with stock ordering, forecasts, or budgets. Johnson also felt that, during the "team concept" period of management, Jackson was trying to operate production in the same manner as Starsky, and Johnson did not wish that type of management to continue.

25. Although Starsky testified that he would have made Jackson plant superintendent had the decision been

his, the Court finds that Starsky would have done so because of Jackson's personal loyalty to him.

26. Starsky believed that Kerner had more total experience in running the operations of the plant.

27. Although Johnson named Kerner plant superintendent, Jackson remained production manager, the second highest position in the plant, and he suffered no loss in pay or benefits.

28. The Court finds that Johnson's decision was based on Kerner's overall greater experience in the bottling industry, that Johnson was justified in relying on breadth of experience in making his decision, and that race did not play a part in the promotion decision.

29. On July 12, 1978, Jackson filed charges of employment discrimination based on Kerner's being named a plant superintendent, and he was subsequently notified by the EEOC that a finding of no probable cause had been made on his charges.

30. Between June 19, 1978, the date of Kerner's promotion to plant superintendent, and December 1, 1980, Jackson remained the production manager of RKO Bottlers of Toledo.

31. In May, 1979 Jackson grabbed the shoulders of a female production employee as if to kiss her, and, later that day, when the same employee requested that Jackson sign her time card, Jackson respondent "for a little sugar, anything can be done around here." The employee, Carol Cowell, told another employee what had occurred. She did not go to work the following day because she was upset over the incident. The next day she told a second employee, Gary Snyder, what had occurred, and Snyder told her that he thought the company could be sued for

sexual harassment and that she probably should be talking to Mr. Johnson. Johnson subsequently called her to his office and inquired as to what had upset her. She told Johnson what had happened, and he asked if she would sign a statement concerning the incident. Cowell indicated that she did not wish to do so. Cowell told Johnson that the same sort of thing had happened to another employee, Beth Alexander. Johnson called Alexander to his office and asked her about Jackson. Alexander indicated that she had had some problems with Jackson but had handled them herself. At no time was any pressure placed upon Cowell to lodge a complaint against Jackson. Johnson told Cowell to think about it for a few days and decide what she wanted to do. Johnson also talked to Jackson and got his side of the story. Johnson had felt, as a matter of corporate policy and good business policy, that it was something that he, as general manager, had to look into. Subsequently, Cowell told Johnson that Jackson had apologized to her and that she wanted to drop the matter and forget it. Johnson did not pursue the matter further. The Court finds that Johnson's actions were not taken to harass Jackson or retaliate for his having filed discrimination charges. Cowell testified that, prior to the May, 1979 incident with Jackson, she and Jackson had hugged and kissed in a friendly fashion, but that the May, 1979 incident was not "friendly."

32. During the period following his filing of charges and before his termination at RKO, Jackson was removed from his office, production meetings were occasionally held without him, and his production schedules were occasionally changed. The actions were not systematic, were within the legitimate prerogatives of Kerner as plant superintendent, and were not related to Jackson's filing of discrimination charges.

33. In November of 1980 the RKO facility had been involved in a bitter labor dispute.

34. On Saturday, November 22, 1980, the day after the strike ended, Frank Taylor, Robert Haas, an hourly paid maintenance mechanic, and another employee had ridden to work together.

35. Television sets were set up in the plant that day so that the personnel could watch the Ohio State—Michigan football game. On previous occasions Haas and Jackson had bet with each other on football games. When Haas lost a bet it was his practice to pay Jackson the following Monday, and Jackson had never had any concern about Haas paying his debts. That Saturday Haas discussed betting on the game with Jackson, but Jackson wanted Michigan and points, and Haas refused to bet.

36. At the end of the day, and after the game, when Haas, Taylor and the other employee were leaving the plant, Jackson asked Haas for $5.00 on his bet. Haas replied that they did not have a bet and continued out of the plant.

37. As the three got to Haas' car, Jackson came out of the plant hurriedly and asked Haas for his $5.00. Haas again replied that he did not have his $5.00 and that they did not have a bet. Jackson ran up to Haas and twice pushed his hand away from the lock as Haas was trying to open the car. At that point Jackson had Haas pinned against the side of the car with his body. Jackson then grabbed Haas in the chest area and spun him across one or two parking spaces and then pinned him against another car.

38. Taylor asked Jackson to let Haas go and also motioned for three security guards, who were sitting in

a vehicle across the parking lot, to come over. As the guards approached, Taylor again asked Jackson to let go of Haas. Jackson complied. The guards said they would have to report the incident and asked Jackson his name, but Jackson refused to give it to them. Taylor gave the guard Jackson's name. Jackson then went back into the plant, and Haas, Taylor, and the other employee drove around to the front of the facility.

39. Taylor went into the office to file a report on the incident with Robert Johnson, but Johnson was not on the premises. While Taylor was inside the office, Jackson came up to the car and told Haas that he was just "funning" with him. Haas, however, did not believe that Jackson had been acting in fun. Taylor likewise considered it a serious incident and reported it to Johnson by telephone late that evening. Taylor felt he had to report the incident because Haas was one of his employees.

40. The following Monday Johnson spoke individually with Taylor, Haas, and Jackson. He also spoke with one of the guards and requested and read the reports of the other two guards. Jackson told Johnson that the incident had been in fun, but both Haas and Taylor told Johnson that they felt that Jackson had been serious.

41. Johnson concluded that the incident had been serious in nature, and he felt that Jackson had broken the rules of good supervisory procedure since supervisors were expected to set an example for the rest of the plant community. Johnson felt that the incident was a hostile act toward an hourly employee. Johnson had in the past discussed with his supervisory personnel this type of contact with hourly employees and had told them that any physical contact with an hourly employee was absolutely

forbidden. Jackson had been warned personally, after the McGee incident, that he would be terminated if he laid hands on an hourly employee again.

42. There had been two other supervisors terminated at RKO, prior to Jackson, both of whom were white. In neither case were the individuals given "hearings." In the RKO organization, salaried supervisors are not subject to the grievance or arbitration procedures mandated by the collective bargaining agreement.

43. John Jackson, in the course of the trial, produced evidence of two white hourly employees who had committed offenses which could have resulted in termination but who had received lesser penalties. Both employees, however, were hourly employees subject to the procedures and terms of the collective bargaining agreement. The defendant produced evidence of numerous black hourly employees who had committed offenses which could have resulted in termination but who were also not fired because of the union agreement. Jackson, however, was not subject to the grievance procedure.

44. Jackson was terminated, because of the incident in the parking lot, on December 1, 1980.

45. Jackson subsequently filed a charge of retaliatory discharge with the Equal Employment Opportunity Commission and the Ohio Civil Rights Commission on May 22, 1981, claiming that he was discharged because he had filed previous charges of race discrimination against RKO. The charge was dismissed by the Ohio Civil Rights Commission, with the finding of no probable cause, on July 1, 1982. The Court, having observed and heard the witnesses called to testify on the incident in the parking lot, does not credit plaintiff's testimony that he was only "playing" and

finds that it was a serious breach of supervisory conduct, of the type about which plaintiff had been previously warned on at least one occasion.

46. The Court finds that the defendant had legitimate business reasons for terminating plaintiff's employment and that the termination was not race related or done in retaliation for Jackson's having filed charges of discrimination.

47. It cannot be said that, but for the filing of charges of discrimination or Jackson's race, he would not have been discharged from his employment as a result of the incident in the parking lot.

Conclusions of Law

1. Federal law expressly prohibits discrimination in employment on the basis of race.

2. Plaintiff carries the ultimate burden of proving racial discrimination. Therefore, even though the burden of going forward with the evidence may shift between the plaintiff and defendant, the burden of persuasion always remains on the plaintiff. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Naraine v. Western Electric Co.*, 507 F.2d 590 (8th Cir. 1974).

3. There is an established pattern for the allocation of the burden of proof in employment discrimination cases. According to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the complainant has the initial burden of establishing a prima facie case of discrimination; he must establish by a preponderance of evidence facts that, if not explained, prove or give rise to an inference of unlawful discrimination. If the plaintiff successfully establishes a prima facie case, the burden shifts to the defendant to

articulate some legitimate nondiscriminatory reasons for its actions. *McDonnell Douglas Corp. v. Green, supra; Texas Department of Community Affairs v. Burdine, supra; Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975). If defendant articulates such a reason, plaintiff may only prevail by showing that the nondiscriminatory reason articulated by the defendant was a mere pretext for the discriminatory actions. "The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" *Trans World Airlines v. Thurston,* 53 U.S.L.W. 4024, 4026 (U.S. January 8, 1985).

4. Title VII unlawful employment discrimination claims may be separated into two distinct categories based upon the effect of the discriminatory action. "Disparate treatment" occurs when an employer purposely treats an individual or a protected class less favorably than nonclass members in an employment practice. Intent to discriminate is a crucial element under the disparate treatment theory. "Disparate impact" occurs when an employment practice is facially neutral, but in actuality affects a protected class more harshly than other classes. Plaintiff need not prove intent to support a claim under disparate impact theory. *See, Grano v. Department of Development of the City of Columbus,* 637 F.2d 1073 (6th Cir. 1980).

5. Liability may not be imposed under 42 U.S.C. §1981 without proof of intentional discrimination. *General Building Contractors Association v. Pennsylvania,* 458 U.S. 375 (1982).

6. Once plaintiff has successfully established a prima facie case, the burden of going forward shifts to defendant. The employer's burden is to articulate some legitimate

nondiscriminatory reason for the employee's rejection. "The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." (Citation omitted.) *Texas Department of Community Affairs v. Burdine, supra,* 450 U.S. at 254-255; *Burnett v. Chicksaw Area Development Commission,* 662 F.2d 1210, 1214 (6th Cir. 1981).

7. The employer's burden is satisfied if he simply sets forth, through the introduction of admissible evidence, legitimate nondiscriminatory reasons for plaintiff's rejection. *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24 (1978).

8. The defendant, however, need not establish, nor is the court to consider whether a decision to promote one person over another is a correct decision or the best approach. The only question is whether the decision to promote one person over another was based upon impermissible considerations of race. The focus is upon an employer's motivation, not its business judgment. *Texas Department of Community Affairs v. Burdine, supra,* 450 U.S. at 259; *Lieberman v. Gant,* 630 F.2d 60, 67 (2nd Cir. 1980); *Loeb v. Textron,* 600 F.2d 1003, 1012, n.6 (1st Cir. 1979).

9. Personnel policies or practices which take into account subjective factors are not unlawful or even suspect absent a showing of adverse impact upon minority groups. *Hamilton v. General Motors Corp.,* 606 F.2d 576, 580 (5th Cir. 1979), *cert. denied* 447 U.S. 907 (1981); *Bauer v. Bailar,* 647 F.2d 1037, 1046-1048 (10th Cir. 1981); *Lieberman v. Gant, supra,* 630 F.2d at 67, n.12; *Burrus v. United Telephone Co. of Kansas, Inc.,* 683 F.2d 339, 343 (10th Cir.

1982), *cert. denied* 103 S. Ct. 491 (1983); *Wilkins v. University of Houston*, 654 F.2d 388, 401 (5th Cir. 1981), *cert. denied* 103 S. Ct. 51 (1983).

10. An employer has the discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. The fact that a court may think that an employer misjudged the qualifications of the applicants does not expose it to Title VII liability. *Texas Department of Community Affairs v. Burdine, supra*, 450 U.S. at 259.

11. Throughout the shifting of burdens, defendant's evidentiary obligation is limited to a burden of production; whereas, plaintiff's obligation is not only to produce but ultimately to persuade. Defendant may overcome a prima facie case by producing credible contradictory evidence, but is not required to produce a preponderance of such evidence. Plaintiff at all times bears the risk of non-persuasion. *Scott v. City of Anniston, Alabama*, 430 F. Supp. 508 (N.D. Ala. 1977).

12. The standard of proof for plaintiff's initial and final burden is preponderance of the evidence. However, the defendant need not disprove plaintiff's prima facie case of discrimination by a preponderance; rebuttal is sufficient if defendant articulates legitimate reasons for employment decisions. *Jackson v. City of Killeen*, 654 F.2d 1181 (5th Cir. 1981).

13. With the successful rebuttal of plaintiff's prima facie case, plaintiff must then go forward, as he retains the ultimate burden of persuasion. Plaintiff must demonstrate by a preponderance of the evidence that defendant's proffered reasons for the employment decision were pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

14. To support a claim of retaliatory discharge, plaintiff must establish: (1) that he engaged in a protected activity; (2) that he was the subject of adverse employment action; and (3) that there is a causal link between his protected activity and the adverse action by his employer. *Burrus v. United Telephone Co. of Kansas, Inc., supra,* 683 F.2d at 343; *Jones v. Lumberjack Meats, Inc.,* 680 F.2d 98, 101 (11th Cir. 1982); *Whatley v. Metropolitan Atlanta Rapid Transit Authority,* 632 F.2d 1325, 1328 (5th Cir. 1980).

15. As to the required causal link, four different standards have been used: (1) whether the protected activity engaged in by plaintiff played any part in the discharge; (2) whether it was a substantial factor in the discharge; (3) whether it was the principal but not sole reason for the discharge; and (4) whether the discharge would have happened anyway had there been no protected activity, which is commonly referred to as the "but for" test. *Sutton v. National Distillers Products Co.,* 445 F. Supp. 1319, 1328 (S.D. Ohio 1978), aff'd. 628 F.2d 936 (6th Cir. 1980). *See* B. Schlei and P. Grossman, *Employment Discrimination Law* 558-62 (1983) and 1983 Supplement 67-68.

16. The "but for" test has been adopted by the United States Supreme Court in cases involving protected activity. *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977); *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273 (1976). It has likewise been adopted by a number of circuit courts. *See, Kauffman v. Sidereal Corp.,* 695 F.2d 343 (9th Cir. 1982); *Williams v. Boorstin,* 663 F.2d 109 (C.D. Cir. 1980), *cert. denied* 451 U.S. 985 (1981); *Womack v. Munson,* 619 F.2d 1292 (8th Cir. 1980).

17. It is uniformly held that employees are not protected or insulated from discipline or discharge merely due to the fact that they have filed charges of discrimination. Employees must be treated alike irrespective of race. *Tanner v. California Physicians' Service*, 27 FEP 593, 596-597 (N.D. Cal. 1978); *Brown v. Ralston Purina*, 557 F.2d 570, 572 (6th Cir. 1977); *Williams v. Boorstin, supra*, 663 F.2d at 117; *Duncan v. General Motors*, 8 FEP 945 (N.D. Ohio 1972), *aff'd.* 495 F.2d 1373 (6th Cir. 1974).

18. When the defendant does not persuade the Court to dismiss the case for failure to establish a prima facie case, under Fed.R.Civ.P. 41(b), and offers evidence of nondiscriminatory reasons for plaintiff's discharge,

> the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the *McDonnell-Burdine* presumption "drops from the case," [*Texas Department of Community Affairs v. Burdine*,] 450 U.S. 248, 255 n.10 (1981), and "the factual inquiry proceeds to a new level of specificity." *Id.*, at 255. After Aikens presented his evidence to the District Court in this case, the Postal Service's witnesses testified that he was not promoted because he had turned down several lateral transfers that would have broadened his Postal Service experience. . . . The District Court was then in a position to decide the ultimate factual issue in the case.

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983). *See Trans World Airlines, Inc. v. Thurston*, 53 U.S.L.W. 4024 (U.S. January 8, 1985); *Weems v. Ball Metal & Chemical Division, Inc.*, No. 83-5544, slip op. (6th Cir. February 4, 1985).

19. Plaintiff satisfied his burden of presenting a prima facie case of discrimination in defendant's decision to not promote him to the position of plant superintendent. The defendant has articulated legitimate nondiscriminatory reasons for his rejection, thus rebutting plaintiff's prima facie case. Plaintiff has failed to prove, by a preponderance of the evidence, that the reasons articulated by defendant were pretextual. Defendant's decision to promote Pete Kerner over John Jackson was not based in any degree upon plaintiff's race. Upon the substantive standards applicable to Title VII in the 1964 Civil Rights Act or to 42 U.S.C. §1981 cases, plaintiff has not established that he was denied the job of superintendent based upon his race.

20. Plaintiff alleged that his discharge from employment with defendant was in retaliation for his having filed this action and/or a discrimination charge. Plaintiff established a prima facie case of retaliation. Defendant articulated a legitimate nondiscriminatory reason for the discharge, to wit: that plaintiff had engaged in conduct unacceptable for a supervisor after having been previously warned concerning such conduct prior to his having filed discrimination charges. Plaintiff remained in the second highest plant position for more than two years and four months prior to the incident which led to termination. The Court is not persuaded by plaintiff's testimony that he was the victim of disparate treatment during that lengthy period. Neither plaintiff's lawsuit nor his charge of discrimination played any part, nor were they substantial or principal factors, in his discharge. Plaintiff would have been discharged regardless of the charges filed with the governmental agencies or this Court.

21. Both plaintiff and defendant have attempted to use statistical evidence in support of their positions. The

Court finds this statistical evidence to be of limited value. First, statistical evidence is not a determinative factor in an action brought by an individual for employment discrimination. See *Harper v. Trans World Airlines, Inc.*, 525 F.2d 409 (8th Cir. 1975). Second, the small size of the samples makes this statistical evidence of questionable value. See *Williams v. Tallahassee Motors, Inc.*, 607 F.2d 689 (5th Cir. 1979). Finally, plaintiff was seeking the position of plant superintendent which called for particular qualifications. When a job requires particular qualifications, any statistical analysis must be limited to those individuals who possess these particular qualifications. See *Hazelwood School District v. United States*, 433 U.S. 299 (1977); *Metrocare v. Washington Metropolitan Area Transit Authority*, 679 F.2d 922 (D.C. Cir. 1982); *Williams v. Tallahassee Motors, Inc., supra.* Neither party presented statistical evidence of this nature.

22. The Court finds that plaintiff has failed to establish that defendant engaged in conduct violative of Title VII of the 1964 Civil Rights Act or 42 U.S.C. §1981.

THEREFORE, for the foregoing reasons, good case appearing, it is

ORDERED that judgment be, and hereby is, entered in favor of defendant RKO Bottlers of Toledo, Inc. and against plaintiff John Jackson.

/s/ JOHN W. POTTER
United States District Judge

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed February 5, 1985)

Case No. C 78-549

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN JACKSON,
Plaintiff

vs.

RKO BOTTLERS OF TOLEDO, INC.,
Defendant.

MEMORANDUM AND ORDER

POTTER, *J.*:

This cause came to be heard upon plaintiff's motion for a new trial and defendant's opposition thereto.

This is a race discrimination in employment action brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.* and 42 U.S.C. §1981. Plaintiff claims that defendant RKO Bottlers of Toledo, Inc. (RKO) discriminatorily refused to promote him and then unlawfully discharged him in retaliation for his having filed discrimination charges. At the time of his discharge, plaintiff was a salaried supervisory employee.

Trial was held before this Court in September and October, 1982. The Court heard extensive testimony over

the course of the nine day trial. On November 15, 1982, the Court filed its Findings of Facts and Conclusions of Law. The Court found in favor of defendant on both the promotion and the discharge issues. The Sixth Circuit Court of Appeals, however, vacated judgment and remanded. *Jackson v. RKO Bottlers of Toledo, Inc.*, No. 82-3803, Slip Op. (6th Cir. August 30, 1984).

The appellate court found several of this Court's factual findings to be clearly erroneous and that these errors led to erroneous conclusions of law. Specifically, the court found that plaintiff established that he was qualified for the position to which he sought promotion; this Court had found that plaintiff had not proven that he was qualified. The appellate court found clearly erroneous this Court's finding that one of the reasons plaintiff was not promoted was because of past showings of "poor judgment." The appellate court further found erroneous this court's characterization of an encounter between plaintiff and another employee, McGee, as a "physical assault" by plaintiff. It also found this encounter to be irrelevant to the promotion issue, though possibly relevant to the retaliatory discharge issue.

The appellate court held that plaintiff had established a prima facie case of discriminatory failure to promote under Title VII. It found unreviewable this Court's findings that defendant had introduced legitimate reasons for not promoting plaintiff and that plaintiff had failed to prove the reasons articulated were pretextual; the court stated that it was not clear whether this Court's findings in this regard were influenced by its clear error with respect to the facts discussed above.

The court also found erroneous what it believed to be this Court's implicit finding that plaintiff failed to establish

a prima facie case of retaliatory discharge. It found plaintiff's evidence sufficient to create an inference of a causal connection between plaintiff's filing of discrimination charges and his discharge from employment. The appellate court found itself with insufficient information to review this Court's weighing and balancing of the evidence related to the retaliation issue.

Finally, turning to plaintiff's 42 U.S.C. §1981 claim, the court found erroneous this Court's statement that plaintiff introduced no evidence to establish intent to discriminate.

The appellate court, in conclusion, found this Court's resolution of the ultimate issue not to be ripe for appellate review. It found that this Court's failure to recognize that plaintiff made a prima facie case with respect to his Title VII claims and his §1981 claim "distorted [the Court's] fact finding process in determining whether the defendant articulated a nondiscriminatory reason sufficient to rebut the inference of discriminatory intent the plaintiff had established." Accordingly, the court vacated the judgment and remanded the action to this Court "for further proceedings consistent with this opinion, including the taking of additional evidence, if necessary."

In the motion under consideration, paintiff seeks a new trial and the reassignment of the case to another judge, as well as trial by jury on his 42 U.S.C. §1981 claims. In the alternative, plaintiff seeks leave to submit newly discovered evidence. Plaintiff, in support of his request for a new trial before a different judge, asserts that this Court will be unable to reinterpret and reevaluate the evidence which it heard more than two years ago. Plaintiff contends that this Court will be unable to render a fair, independent and impartial decision in light of the

appellate court's determinations, described above. The Court and counsel for the parties have discussed, in two recent pretrials, some of the issues which plaintiff now raises by motion.

The Court is convinced that the proper course, and that mandated by the Sixth Circuit, is for this Court to itself reconsider the record and to resolve the action in the light of the appellate court opinion. This is the course of action which the Supreme Court found proper in *Pullman-Standard v. Swint,* 456 U.S. 273 (1982), cited by the Sixth Circuit in its opinion, where the Supreme Court stated:

> When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings . . . . [W]hen a district court's finding on . . . an ultimate fact is set aside for an error of law, the court of appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance.

Id. at 291, 293.

In remanding, the court also cited *United States Postal Service Board v. Aikens,* 460 U.S. 711 (1983) in support of its decision. In *Aikens,* the Supreme Court found that the district court had erred on the issue of the sufficiency of the prima facie case. The trial court had not, however, dismissed at the close of plaintiff's case in chief; rather the case was fully tried on the merits, as was this action. The Supreme Court, finding that "[t]he district court has before it all the evidence it needs to decide whether

'the defendant intentionally discriminated against the plaintiff' ", remanded the case to the district court.

The appellate court, in remanding to this Court, also cited to the dissenting opinion in *Wells v. Gotfredson Motor Co.*, 709 F.2d 493 (8th Cir. 1983). In *Wells,* the majority held that the trial court had erred in holding that plaintiff had not made a prima facie case of discrimination. However, it determined, from the trial court's memorandum regarding plaintiff's motion for a new trial, that the trial court recognized that an inference of discrimination could have been drawn from plaintiff's evidence. It agreed with the district court that plaintiff had failed to carry her ultimate burden of persuading the trier of fact that she had been discriminated against. It therefore affirmed.

In his dissent, Chief Judge Lay maintained that the proper procedure for the appellate court was not affirmance but a "remand to the district court for a de novo review of the record." *Id.* at 496. Judge Lay objected to the majority's resolution of the factual issues of whether plaintiff's employer had articulated a sufficient nondiscriminatory reason for failing to promote plaintiff and of whether plaintiff had carried her ultimate burden of persuasion. *Id.* at 498. He maintained that the appropriate procedure is to vacate the judgment and remand the case to the district court. This is the procedure followed by the Sixth Circuit in this case. In a footnote, Judge Lay expressed the opinion that plaintiff should have a new trial before a different judge. *Id.* at 498, n.2. This Court believes that the Court of Appeals cited the *Wells* case for the proposition that remand was the proper procedure, not for the proposition that plaintiff should have a new trial. The language of the court's order, quoted above, makes this clear.

The Court has no doubt that it will be able to fairly review the extensive trial record of this case in the light of the appellate court's opinion. Accordingly, the Court will deny plaintiff's motion insofar as it seeks a new trial.

In the alternative, plaintiff requests the opportunity to submit additional evidence on the issue of retaliatory discharge. The evidence which plaintiff seeks to produce is that a white supervisor (David Clements) who assaulted an hourly employee approximately two months after plaintiff's trial was not terminated but rather received only a written warning. See affidavit of Scott Tracy, the employee who was the victim of the assault. Plaintiff maintains that this evidence is significant as it "is the only evidence that directly reveals the disparate treatment of the Plaintiff because of his race."

The decision to reopen a case to receive additional evidence is committed to the discretion of the trial judge. *Zenith Radio Corp. v. Hazeltine Research,* 401 U.S. 321, 331; *Calage v. University of Tennessee,* 544 F.2d 297 (6th Cir. 1976). In support of his request to reopen for additional testimony, plaintiff cites *Contempo Metal Furniture Co. of California v. East Texas Motor Freight Lines, Inc.,* 661 F.2d 761 (9th Cir. 1981). In that case the court stated that reopening the case may have been warranted had the contentions made in support of the motion to reopen been uncontradicted. Having found movant's assertions had been challenged, however, the court upheld the trial court's denial of the motion. *Id.* at 767. This action is in much the same posture.

In its opposition to plaintiff's request that the record be reopened, defendant asserts that the Clements assault, rather than providing evidence that defendant's reasons for firing plaintiff were pretextual, shows that defendant con-

sistently applied its policy regarding physical incidents between supervisors and employees. Defendant points to evidence in the trial transcript that when, several years before his termination, plaintiff was involved in a "physical incident" (the encounter with McGee, referred to above) he was warned that he would be terminated if involved in another physical incident with an hourly employee. In his affidavit, Mr. Clements testifies that, as a result of the incident with Scott Tracy, he received a written reprimand which stated that any further incident of that kind would result in his immediate discharge. He further testifies that he had not previously been involved in such an incident.

Defendant also offers the affidavit of Robert Johnson, manager of RKO, who states that, several months ago, a white salaried employee was terminated for physically attacking an hourly employee although the terminated employee had not previously been involved in such an incident while in defendant's employ. Mr. Johnson testifies that the employee was fired because of the severity of the victim's injuries.

The Court finds that the evidence which plaintiff seeks to offer is not sufficiently probative to warrant the reopening of the case for the taking of additional testimony. The Court will, therefore, deny plaintiff's motion as it relates to the submission of additional evidence.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that plaintiff's motion for a new trial be, and the same hereby is, DENIED.

/s/ JOHN W. POTTER
United States District Judge

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed August 30, 1984)

No. 82-3803

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN JACKSON,
Plaintiff-Appellant,

vs.

RKO BOTTLERS OF TOLEDO, INC.,
Defendant-Appellee.

ON APPEAL from the United States District Court
for the Northern District of Ohio,
Western Division.

Before: KEITH and MARTIN, *Circuit Judges;* and HILLMAN, *District Judge.**

HILLMAN, *District Judge.* Plaintiff filed suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* (1976), and, 42 U.S.C. § 1981 (Section 1981), claiming that defendant discriminated against him on account of his race. Jackson, who is black, claimed that RKO Bottlers of Toledo (RKO) discriminatorily refused to promote him and then unlawfully discharged him in retaliation for his having filed discrim-

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*Honorable Douglas W. Hillman, District Judge, United States District Court for the Western District of Michigan, sitting by designation.

ination charges. Following a bench trial, the district court filed a memorandum opinion concluding that plaintiff failed to prove that defendant unlawfully discriminated against him in either the matter of promotion or discharge. Judgment was entered for defendant and plaintiff appealed.

FACTS

Plaintiff, John Jackson, is a black male. Defendant, RKO Bottlers of Toledo, Inc., manufactures, bottles and distributes soft drinks. Plaintiff began work in 1951 as a general laborer with Variety Club, defendant's predecessor, located in Toledo, Ohio. In 1966, defendant purchased Variety Club, including Variety Club's franchise for bottling and distributing Pepsi Cola. In 1969, RKO built a bottling and distribution facility on Hill Avenue in Toledo, Ohio (Hill Avenue). Plaintiff was offered, and accepted, the opportunity to move to Hill Avenue as working line foreman. In 1974, RKO made plaintiff a salaried supervisory employee, changing his title from working line foreman to Production Supervisor.

From 1969 until 1978, the Plant Superintendent at the Hill Avenue facility was Dan Starsky. Starsky testified that plaintiff functioned as his assistant during the nine-year period Starsky was Plant Superintendent at Hill Avenue. Plaintiff filled in for Starsky during periods when Starsky was absent, albeit with instructions left by Starsky. Plaintiff was responsible for supervising approximately 50 employees. In April of 1978, Starsky received a promotion to become general manager at the RKO facility in Muncie, Indiana. Initially, Robert Johnson (Johnson), the General Manager of RKO in Toledo, decided to replace the Plant Superintendent position with

a "team concept" used at other bottling plants. Johnson made plaintiff production manager, another employee, Pete Kerner, warehouse manager, and a third employee, Frank Taylor, maintenance manager of the Hill Avenue facility. Thereafter, Johnson became dissatisfied with the team management system and decided to appoint one individual as Plant Superintendent. He considered plaintiff, Kerner and Taylor for the position, but only plaintiff and Kerner received serious consideration. In June, 1978, Kerner was selected over plaintiff for the position of Plant Superintendent.

Kerner had also worked at Variety Club since 1951. From 1969 until 1972, Kerner was the Assistant Plant Superintendent at Variety Club. There was much conflict, even among defendant's own witnesses, concerning the extent of Kerner's autonomy as Assistant Plant Superintendent at the Variety Club facility from 1969 until 1972. This issue was relevant to plaintiff's contention that his (Jackson's) skills and experience were superior to Kerner's relative to the Hill Avenue Plant Superintendent position. Defendant, on the other hand, stressed Kerner's history of having managed the Variety Club facility independently and effectively. Kerner testified that Starsky, Plant Superintendent at Hill Avenue, had little involvement at Variety Club and that he (Kerner) reported to Bill McCluskey, who was Plant Manager at Variety Club. Starsky, however, testified that he (Starsky) was Kerner's boss. Starsky further testified that he went over to Variety Club every week or so and probably told Kerner what to buy and what to schedule. Jim Snyder, Vice President and General Manager of RKO from 1969 until 1974, testified that Starsky went to Variety Club once or twice a week, and that he himself probably went once every two weeks.

In 1972, the Variety Club operation was closed in favor of the more modern Hill Avenue facility. Kerner then became night warehouse supervisor at the Hill Avenue facility, supervising approximately 10 to 15 employees. It is neither necessary nor proper, for purposes of this appeal, for this court to resolve conflicting evidence regarding the respective experience and qualifications of plaintiff and Kerner with regard to the Plant Superintendent position at Hill Avenue, and we do not do so.

On July 12, 1978, plaintiff filed charges of employment discrimination with the Ohio Civil Rights Commission and the United States Equal Employment Opportunity Commission alleging that he had not been promoted to the position of Plant Superintendent because of his race. On November 15, 1978, he filed this action. Plaintiff alleges that, subsequent to filing this lawsuit and his charges of discrimination, he was subjected to a series of retaliatory actions until his discharge effective on December 1, 1980. After filing discrimination charges, plaintiff was removed from his office. According to defendant, it was Kerner's prerogative, as Plant Superintendent, to choose his office and he chose the office occupied by plaintiff. Defendant claims that plaintiff had the option of sharing a different office with Taylor, who had remained maintenance manager, but that plaintiff declined this arrangement.

Plaintiff further claims defendant retaliated against him when Johnson allegedly urged two female employees, Carol Cowell and Beth Alexander, to file sexual harassment charges against plaintiff in May of 1979. There was conflicting evidence regarding whether Johnson in fact urged the two employees to file these charges against

plaintiff, as well as the facts surrounding the underlying incident(s). Neither Cowell nor Alexander, in fact, filed sexual harassment charges.

Plaintiff further alleges that defendant retaliated against him following his filing of discrimination charges by excluding him from production management meetings and by changing his bottling schedules without notice on a number of occasions. According to plaintiff, defendant's final act of retaliation was his discharge from employment.

Plaintiff was discharged by defendant in November, 1980. The incident triggering this discharge occurred after working hours on November 22, 1980, in defendant's parking lot and involved physical contact between plaintiff and one of the defendant's hourly employees, Robert Haas (Haas). Conflicting evidence was introduced as to whether the incident was one of friendly horseplay or was a more serious assault by plaintiff against Haas. November 22, 1980, was the last day of a strike by defendant's hourly employees. During the strike, the plant had been run by supervisory employees and hourly employees not participating in the strike. It was also the day of the University of Michigan-Ohio State football game. The mood at the plant was jovial, both by reason of the end of the strike and the football game. Television sets were placed in the plant that day in order that defendant's personnel could watch the game. On prior occasions, plaintiff and Haas had bet on football games. Plaintiff claims that on November 22, 1980, he and Haas had such a bet. This was denied by Haas.

As Haas and Taylor, the maintenance manager, were leaving the plant, plaintiff and Haas engaged in a verbal exchange about whether Haas owed plaintiff $5 from a

bet on the game. Plaintiff followed Haas from the parking lot, approached him and again asked him for the bet money. As noted, the tone of this exchange, i.e. whether humorous or serious, is in dispute. In any event, plaintiff grabbed Haas's clothing and pinned him against Haas's car and then released him. Three security guards, on the premises because of the strike, observed the incident and approached plaintiff and Haas. By the time the guards walked over to the scene of the incident, plaintiff had released Haas.

Taylor, who was present during the incident, reported the incident to Johnson later that weekend after several attempts to reach him. After an investigation of the incident, the thoroughness of which was vigorously disputed, Johnson discharged plaintiff. Defendant characterizes the discharge as a reasonable response to a serious breach of company policy, and notes that plaintiff had been warned previously to never put his hands on an hourly employee. Plaintiff contests both the seriousness of the incident and whether it was the real reason for his discharge. Plaintiff characterizes it as a pretext for what in reality was a retaliatory discharge because of plaintiff's activity protected by Title VII.

DISCUSSION

Section 703(a) of the Act, 42 U.S.C. § 2000e-2(a), makes it unlawful for an employer to discriminate against an employee because of the empolyee's race, and section 704(a), 42 U.S.C. § 2000e-3(a), make it an unlawful employment practice to discriimnate against an employee for filing a charge under Title VII.

A decision by a district court on the issue of discrimination, or lack thereof, under Title VII is subject to review

under the clearly erroneous standard of Rule 52(a), Fed. R.Civ.P.; *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Anne Geisler v. Frank Folsom, Jr., et al.*, 6th Cir. Slip Op. 82-5785, June 1, 1984. Findings of the district court are not clearly erroneous unless, upon review of the entire record, the court is left with a definite and firm conviction that a mistake has been committed. *Godley v. Kentucky Resources Corp.*, 640 F.2d 831, 834 (6th Cir. 1981). However, the clearly erroneous standard does not insulate either the trial court's conclusions of law, *Pullman-Standard*, 456 U.S. at 287, or factual findings that result from application of incorrect legal principles. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982).

There is an established pattern for the allocation of proof in employment discrimination cases applicable to both of plaintiff's claims, i.e., discrimination in promotion and retaliatory discharge. According to *McDonnell-Douglas Corporation v. Green*, 411 U.S. 792 (1973), the plaintiff has the initial burden of establishing a prima facie case of discrimination. Plaintiff must establish facts, by a preponderance of the evidence, which if not explained, prove or give rise to an inference of unlawful discrimination. If the plaintiff successfully establishes a prima facie case, the burden is then upon the defendant to articulate a legitimate, nondiscriminatory reason or reasons for its actions. *McDonnell-Douglas Corporation v. Green*, 411 U.S. at 802; *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Albemale* [sic] *Paper Company v. Moody*, 422 U.S. 405 (1974). If defendant comes forward with such a reason, plaintiff may then attempt to establish that the nondiscriminatory reason articulated by the defendant was a mere pretext for the alleged dis-

criminatory actions. *Burdine*, 450 U.S. at 256. However, the plaintiff at all times carries the ultimate burden of proving racial discrimination. Even though the burden of going forward with the evidence may shift between the plaintiff and the defendant, the burden of persuasion always remains with the plaintiff. *Haynes v. Miller*, 669 F.2d 1125, 1126-1127 (6th Cir. 1982).

As noted by the Supreme Court in *U.S. Postal Service Board of Governors v. Aikens*, 103 S.Ct. 1478 (1983), an analysis of the reasons for failing to promote an employee or the reasons for his discharge raise issues for the fact finder that are both sensitive and difficult. Direct evidence in Title VII cases is usually not available. "There will seldom be 'eyewitness' testimony as to the employer's mental processes." *Id.* at 1482. For this reason, the prima facie analysis established in *McDonnell-Douglas* becomes crucial. Once a plaintiff establishes a prima facie case he eliminates the most common nondiscriminatory reasons for plaintiff's rejection: the plaintiff's lack of qualifications or the absence of a vacancy in the position sought. *Burdine*, 450 U.S. at 253-4. Once the plaintiff's prima facie case is established, the burden shifts to the defendant employer to rebut the resulting inference of discriminatory intent. The burden shifting rule in Title VII cases is critical because in light of the prima facie case a trier of fact presumes that the employer's acts, "if otherwise unexplained, are more likely than not, based on the consideration of impermissible factors." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

McDonnell-Douglas and *Burdine* establish four necessary elements applicable to plaintiff's promotion claim, for a prima facie case of disparate treatment because of race under Title VII. The plaintiff must show: (1) that he

belongs to a racial minority; (2) that he applied and was qualified for a desired position for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the employer continued to seek applicants from persons of plaintiff's qualifications. *McDonnell-Douglas v. Green*, 411 U.S. at 802; *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 256; *Draper v. Smith Tool and Engineering Company*, 6th Cir. Slip Op. 82-1966 (February 27, 1984).

Plaintiff also claims that he was discharged in retaliation for having filed suit when not promoted to Plant Superintendent. To support a claim of retaliatory discharge, plaintiff must establish: (1) that he engaged in activity protected by Title VII; (2) that he was the subject of adverse employment action; and (3) that there exists a casual [sic] link between his protected activity and the adverse action of his employer. *Burrus v. United Telephone Company of Kansas, Inc.*, 683 F.2d 339, 343 (10th Cir. 1982), *cert. denied*, 459 U.S. 1071 (1983); *Jones v. Lumberjack Meats, Inc.*, 680 F.2d 89, 101 (11th Cir. 1982); *Whatley v. Metropolitan Atlanta Rapid Transit Authority*, 632 F.2d 1325, 1328 (5th Cir. 1980).

The trial court correctly articulated the legal standards applicable to plaintiff's case. Neither plaintiff nor defendant disputes their accuracy. However, plaintiff challenges several of the trial court's factual findings and the application of the law to the facts generally. Upon careful evaluation of the record, we agree that several of the court's factual findings are clearly erroneous and that these errors led to erroneous conclusions of law.

We first review plaintiff's claim that he was discriminatorily denied promotion, then his claim of retaliatory discharge, and finally his claim under 42 U.S.C. § 1981.

Denial of Promotion

We find several of the district court's findings of fact, with respect to plaintiff's claim that he was discriminatorily denied promotion, clearly erroneous. The specific factual errors are as follows:

1. The trial court found that plaintiff had not proved that he was qualified for the position of Plant Superintendent. The only evidence that plaintiff was not qualified was one statement by Johnson, defendant's general manager, that he "felt" plaintiff was not qualified for the position. However, Johnson testified that plaintiff was seriously considered for the position of Plant Superintendent. Johnson articulated no objective criteria which plaintiff did not meet. Plaintiff had functioned as assistant to the former Plant Superintendent, Starsky, for nine years. There was evidence that plaintiff lacked experience in the areas of sales and night loading. However, defendant never offered, nor did the court find, that experience in these areas was reasonably related to the performance of the Plant Superintendent's job. *See Furnco Construction Corp. v. Waters,* 438 U.S. at 578. Likewise, it was uncontroverted that the former Plant Superintendent, Starsky, had not had sales or night warehousing experience prior to becoming superintendent. Defendant may have legitimately found Kerner more qualified to be Plant Superintendent than plaintiff. Nevertheless, defendant cannot justify its choice of one candidate over another after the fact by claiming contrary to the facts that the rejected candidate did not possess the minimal qualifications for the promotion. Plaintiff clearly established that he was qualified for the position of Plant Superintendent. In sum, the trial court's finding that he was not qualified is clearly erroneous.

2. The trial court further found that one of the reasons defendant had not selected plaintiff as Plant Superintendent was because in the past he had shown "poor judgment." Defendant never claimed, nor produced evidence to demonstrate, that this was a reason for selecting Kerner over plaintiff for the Plant Superintendent position. Defendant's proffered reason for choosing Kerner was that Kerner's overall qualifications were superior to plaintiff's due to what defendant characterized as greater breadth of experience in the industry. The trial court's addition of a reason for rejecting plaintiff for promotion, not advanced by defendant, nor supported by substantial evidence, is clearly erroneous.

3. One of the instances of "poor judgment" which the trial court erroneously concluded had influenced the defendant's promotion decision was that, in 1976, plaintiff "physically assaulted" an hourly employee named McGee. This finding is not relevant to the promotion issue since defendant never claimed that the incident was a reason for failing to promote plaintiff. It merits detailed attention, however, because it may be relevant to plaintiff's claim of retaliatory discharge.[1]

Insofar as the term "assault" implies aggressive and violent action, no evidence was offered to support this finding. The testimony of the defendant's own witness, John McCullum, defendant's union steward and an eyewitness to the event, contradicts any such finding. McCullum described McGee as first being insubordinate to plaintiff, then becoming angry and finally advancing on

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1. Defendant offered this 1976 episode as one reason to justify its discharge of plaintiff for the parking lot incident in November of 1980. The erroneous characterization of the 1976 incident with McGee as an "assault" is relevant to plaintiff's attempt to demonstrate pretext.

plaintiff in a threatening manner. McCullum reported that when McGee had advanced close to plaintiff, plaintiff grabbed McGee and pushed him away. McCullum further testified that had he been plaintiff, he would have hit McGee, implying that plaintiff, far from assaulting McGee, had shown restraint in dealing with the situation. No union grievance was ever filed. The matter was resolved in a meeting with Johnson, plaintiff, McGee and McCullum. McCullum testified that Johnson never asked for McCullum's version of the incident. On the basis of the testimony of the only eyewitness to the incident, other than plaintiff, there is no substantial evidence to support the trial court's finding that plaintiff physically assaulted McGee.

These factual errors are important because they caused the trial court to erroneously conclude that plaintiff had failed to establish a prima facie case with respect to his claim that he had been discriminatorily denied promotion. Plaintiff did in fact establish a prima facie case: he was a member of a protected group, applied for promotion to a job for which he was qualified and was rejected in favor of Kerner, who had comparable qualifications. The trial court did state in conclusory terms that even had plaintiff established a prima facie case, defendant had introduced legitimate reasons for not promoting plaintiff and plaintiff had failed to prove the reasons were pretextual. However, we are unable to review these conclusions since it is not clear that the trial court was not influenced by its clear error with respect to those facts discussed above, and the related erroneous legal conclusion that plaintiff had failed to establish a prima facie case.

Retaliatory Discharge

The trial court did not directly address the question of whether plaintiff established a prima facie case of employment discrimination regarding his claim of retaliatory discharge. However, a review of that portion of the trial court's opinion persuades this court that the trial court implicitly found that plaintiff had failed to establish a prima facie case of retaliation. We find error in this conclusion. Plaintiff's burden with respect to establishing a prima facie case is not onerous. *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 253. He need only introduce evidence from which an inference can be drawn that he would not have been discharged had he not filed discrimination charges. *Cf. Id.* at 254. Plaintiff produced evidence that, following the filing of charges, he was removed from his office, excluded from production meetings, and that defendant's general manager improperly attempted to persuade two female employees to file sexual harassment charges against plaintiff.[2] Plaintiff further introduced evidence raising an inference that the incident triggering discharge was not carefully investigated and that defendant on other occasions had treated similar incidents more leniently with other employees. Minimally, this evidence was sufficient to create an inference of a casual [sic] connection between plaintiff's filing of discrimination charges and his discharge from employment after 29 years in defendant's service.[3]

We are mindful that the trial court may have found that despite this inference, plaintiff had ultimately failed

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2. One of these employees, Beth Alexander, testified that there was no basis for these charges.

3. We note that there is no question that plaintiff had engaged in protected activity, that defendant knew of this activity and that plaintiff suffered from an adverse employment decision.

to prove that defendant's proferred [sic] legitimate reason was pretextual. However, the trial court's non-recognition of any inference of retaliatory motive leaves us unable to review its weighing and balancing of the evidence bearing on the retaliation issue.[4] The trial court correctly noted that plaintiff is not shielded from legitimate discipline because he filed a charge of discrimination. *See Brown v. Ralston Purina Company,* 557 F.2d 570, 572 (6th Cir. 1977). However, an employer may not use what theoretically may be a legitimate cause for discipline as a pretext for what is in reality retaliation against an employee for engaging in activity protected under Title VII. The trial court in this case appears to have rejected plaintiff's retaliation claim on the grounds that an employer would be justified in discharging an employee for the defendant's proffered reason, the parking lot incident. Whether the trial court was correct or not in this finding is not the issue. The correct inquiry is whether defendant in fact fired him for this reason. Once plaintiff established a prima facie case, he was entitled to the opportunity to demonstrate that the proffered nondiscriminatory reason was not, in fact, the reason he was discharged. *Aikens,* 103 S.Ct. at 1482, n. 5. We find that plaintiff introduced sufficient evidence to raise a factual question concerning pretext. We cannot be assured that the plaintiff's attempt to demonstrate pretext was fairly considered when the

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4. For example, the trial court relied in part on the length of time between defendant's filing his discrimination charge on July 12, 1978, and his discharge on December 1, 1980, making it unlikely that the two incidents were causally related. *See Hochstadt v. Worcester Foundation for Experimental Biology,* 425 F.Supp. 318, 324 (D. Mass. 1976), *aff'd* 545 F.2d 222 (1st Cir. 1976). This reliance makes it clear that the trial court ignored evidence introduced by plaintiff, which if believed, would raise an inference that defendant had engaged in a pattern of retaliatory conduct beginning soon after plaintiff filed discrimination charges.

trial court did not acknowledge plaintiff's prima facie case of retaliatory discharge. The plaintiff may have lost his case at trial because the district court erred in failing to recognize his prima facie case. Additionally, as noted previously, we cannot be certain that the trial court was not influenced in its determination of the defendant's true motivation by its erroneous factual finding that plaintiff had, in 1976, physically assaulted another employee.

Plaintiff's Section 1981 Claim

With respect to plaintiff's claim under 42 U.S.C. § 1981, the trial court stated:

> "Plaintiff introduced no evidence to establish intent to discriminate. Therefore, plaintiff's claims under 42 U.S.C. § 1981 fails for lack of this proof."

Section 1981 provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and extractions of every kind, and to no other."

Purposeful discrimination is a prerequisite to liability under section 1981. *General Building Contractors Assoc., Inc. v. Pennsylvania, et al.*, 458 U.S. 375, 388-389 (1982). We find error, however, in the trial court's conclusion that plaintiff introduced no evidence of intent to discriminate. The trial court's rationale for reaching that conclusion was

not explained and is not otherwise evident. As noted, plaintiff established a prima facie case of both discrimination in promotion and retaliatory discharge violative of Title VII, raising a rebuttable presumption that he was denied promotion and/or discharged because of intentional discrimination. Plaintiff's evidence establishing a prima facie case under Title VII satisfied his prima facie evidentiary burden with respect to his section 1981 claim. *See, e.g., Kenyatta v. Bookey Packing Company,* 649 F.2d 552 (8th Cir. 1981); *Person v. J. S. Alberici Construction Co. Inc.,* 640 F.2d 916 (8th Cir. 1981). Discriminatory intent may be established by any evidence logically supporting an inference of that intent. *Detroit Police Officers Ass'n v. Young,* 608 F.2d 671 (6th Cir.), *cert. denied,* 452 U.S. 938 (1979). Plaintiff was not required to produce direct evidence of discriminatory intent. *See Aikens,* 103 S.Ct. 1478; *Burdine,* 540 U.S. at 253.

In addition to the rebuttable presumption created by plaintiff's prima facie case on both his failure to promote and retaliatory discharge claims which gave rise to an inference of intentional discrimination, plaintiff introduced other evidence that would support such an inference. Beth Alexander testified that Johnson, defendant's general manager, attempted to persuade Alexander to sign a sexual harassment charge against plaintiff, and that Johnson told her signing that charge would put an end to plaintiff's "trouble making." Alexander testified that she believed that Johnson was urging that she and Cowell file sexual harassment charges because Jackson had filed this suit. Additionally, the testimony of Burton Calif would give rise to an inference of discriminatory intent. Calif, an employee of defendant, was promoted to a position as production supervisor in 1979 and reported to plaintiff prior to plaintiff's discharge. Calif testified that plaintiff

was excluded from production meetings during the period following plaintiff's filing of discrimination charges and prior to his discharge.

The foregoing is not necessarily the only evidence plaintiff introduced of intent to discriminate, but it is illustrative of the error in the trial court's conclusion that plaintiff introduced no such evidence. The trial court may have thought plaintiff was required to produce direct evidence of discriminatory intent; it may have rejected plaintiff's evidence as not worthy of belief, or found that defendant's evidence that it did not discriminate outweighed the evidence introduced by plaintiff. Whatever its basis, the trial court's conclusion that plaintiff introduced no evidence of discriminatory intent is in clear error.

CONCLUSON

In focusing on the trial court's failure to recognize plaintiff's prima facie case with respect to both of plaintiff's Title VII claims, as well as his claim under section 1981, we are aware that the Supreme Court has cautioned that the ultimate question is whether plaintiff has proved discrimination on the part of defendant by a preponderance of the evidence. *Aikens*, 103 S.Ct. at 1482. However, the Court also recognized that erroneous conclusions regarding the nature of plaintiff's burden may render the trial court's resolution of the ultimate issue not ripe for proper review. *Id.* at 1483. We find this to be the case in the instant action. Because of the trial court's erroneous factual and legal conclusions, we are unable to determine whether those conflicts were properly resolved. *Cf. Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), *cert. denied* 389 U.S. 847 (1967).

This is particularly true because the district court failed to recognize that Jackson had made a prima facie case, with respect to both his Title VII claims and Section 1981 claim. This distorted its fact finding process in determining whether the defendant articulated a nondiscriminatory reason sufficient to rebut the inference of discriminatory intent the plaintiff had established. See *Wells v. Gotfredson Motor Co., Inc.*, 709 F.2d 493, 498 (8th Cir. 1983) (Lay, C.J., dissenting). We find vacating the judgment and remand to be the appropriate disposition. *U.S. Postal Service v. Aikens, supra.* In *Pullman-Standard*, 456 U.S. 273, the Supreme Court was faced with a similar problem. The Court of Appeals had concluded that the district court committed an error of law in failing to consider relevant evidence with respect to the motive of one union involved in establishing a seniority system challenged under Title VII. The Court of Appeals then made an independent consideration of the record and determined that the defendant unions had acted with discriminatory intent. The Supreme Court reversed the Court of Appeals' holding that when a district court's ultimate finding as to discriminatory intent is set aside for errors of law, the case must be remanded to the fact finding tribunal. The Court explained:

> "When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings . . . Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue."

Id. at 291-2. (Citations omitted)

Accordingly, the decision below is reversed. The judgment is vacated, and the case is remanded to the district court for further proceedings consistent with this opinion, including the taking of additional evidence, if necessary.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT

(Filed November 15, 1982)

Case No. C 78-549

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN JACKSON,
Plaintiff,

VS.

RKO BOTTLERS OF TOLEDO, INC.,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

POTTER, *J.*:

This is an employment discrimination action brought under 42 U.S.C. §2000e et seq. and 42 U.S.C. §1981. Plaintiff seeks relief for defendant's allegedly discriminatory actions in failing to promote plaintiff and in firing plaintiff in retaliation for plaintiff's having filed discrimination charges.

Prior to trial both parties submitted pretrial briefs and proposed findings of fact and conclusions of law.

The trial was had before the Court on September 28, 29, 30, October 1, 5, 6, 13, 14 and 15, 1982. At the close of all the evidence the parties, at the Court's request, engaged in extensive oral closing argument which included citation of authorities. Key citations were furnished to the Court prior to oral argument and supplemented on the day of argument. The Court examined these authorities prior to and during the closing argument.

Both parties were invited to and have submitted supplemental findings of fact and conclusions of law. The Court has considered the proposed findings of fact and conclusions of law submitted both prior to and after trial and has made it own independent determination.

Findings of Fact

The plaintiff in this action, John Jackson, is a black male. Plaintiff began work as a general laborer with Variety Club located on Monroe Street, Toledo, Ohio, on April 1, 1951. In 1966 defendant purchased Variety Club including the franchise for bottling and distributing Pepsi.

In June of 1969, defendant built a bottling and distribution facility on Hill Avenue in Toledo, Ohio. The Plant Superintendent at Variety Club, Dan Starsky, became plant superintendent of this new plant. Plaintiff was offered and accepted the job of working line supervisor at Hill Avenue. Plaintiff remained an hourly union employee. In 1974, Plaintiff was made a salaried employer and received the title of Production Supervisor.

Plaintiff's duties as working line supervisor and later production line supervisor consisted of supervising the sorting area and running the bottling line. Mr. Starsky, the plant superintendent, maintained tight control over

all operations at the plant including those performed by the plaintiff. Plaintiff was left in charge of production during those times when Mr. Starsky was absent. Mr. Starsky, however, always left detailed instructions concerning operation of the plant.

In April of 1978 Dan Starsky left his position as Plant Superintendent with defendant to assume the position of Vice President and General Manager of the RKO Bottling facility in Muncie, Indiana. Robert Johnson, the General Manager of RKO in Toledo, decided to replace the Plant Superintendent position with a team concept used at other bottling plants. Mr. Johnson divided up the responsibilities held by Mr. Starsky among three individuals. There was no contest between these three individuals for the position of plant superintendent. Mr. Johnson made plaintiff production manager, Pete Kerner warehouse manager and Frank Taylor maintenance manager.

When the team concept did not succeed, Mr. Johnson decided to appoint one individual as Plant Superintendent. He considered Pete Kerner, plaintiff and Frank Taylor. Pete Kerner was selected for this position in June of 1978.

Mr. Johnson selected Pete Kerner because of Mr. Kerner's overall qualifications. Mr. Kerner began working for Joelen Beverage, a predecessor to Variety Club as a truck loader in 1946. In the late 1950's Mr. Kerner became a checker, checking trucks into and out of the Variety Club warehouse. In 1966 Mr. Kerner was promoted to Assistant Plant Superintendent of Variety Club. When Mr. Starsky left Variety Club on Monroe Street to become Plant Superintendent of the new facility on Hill Avenue, Mr. Kerner became Plant Superintendent of Variety Club. As Plant Superintendent, Mr. Kerner re-

ported to William McCluskey, the General Manager of Variety Club. Mr. Kerner ran the Variety Club operation to the satisfaction of his superiors. When the Variety Club facility shut down its operation on Monroe Street in 1972 Pete Kerner became Warehouse Supervisor/Night Supervisor in charge at the Hill Avenue facility. His duties included some supervision of production if the plant was operating in the evenings.

The other individual considered for the position of Plant Superintendent, Frank Taylor, began working for defendant in approximately 1969 in the special events section. Mr. Taylor became an apprentice in vending service approximately one year later. After one year as an apprentice, he became a refrigeration mechanic. In 1975 Mr. Taylor was promoted to a working foreman in production. In March 1978 Mr. Taylor was promoted to maintenance manager.

When Mr. Johnson decided to return to the plant superintendent system of management Mr. Johnson eliminated Mr. Taylor from consideration because Mr. Taylor did not have as much experience as Mr. Kerner or as plaintiff. Mr. Johnson was familiar with past employment histories of plaintiff, Mr. Kerner and Mr. Taylor in part because of the small size of defendant's operations. Mr. Johnson had come to Toledo as General Sales Manager for Variety Club in 1966 and was promoted to General Manager of defendant in 1974. Mr. Johnson selected Mr. Kerner to be Plant Superintendent because of Kerner's overall experience and skills including the fact that Mr. Kerner had successfully run Variety Club on Monroe Street for the last three years of its operation. Race was not a factor in Mr. Johnson's selection of Pete Kerner over plaintiff for Plant Superintendent.

One reason that Mr. Johnson did not select plaintiff as Plant Superintendent is that plaintiff had shown poor judgment in the past in certain management situations. In 1969, plaintiff drew a gun on another employee who was teasing plaintiff with a toy snake. In 1976 he physically assaulted an hourly employee named McGee. After the incident with McGee, plaintiff was told by Mr. Johnson that if plaintiff ever physically assaulted an hourly employee again he would be terminated.

The majority of management witnesses agreed that Pete Kerner was the best qualified for the job of Plant Superintendent. Mr. Starsky admitted that he might have told plaintiff that plaintiff would be Plant Superintendent. Mr. Starsky indicated, however, that this was contingent on Mr. Starsky's becoming General Manager of defendant. This event never occurred. Mr. Starsky also indicated that he would have made plaintiff Plant Superintendent because plaintiff followed his orders.

In 1978, total employment at RKO on Hill Avenue approximated between 180 to 200 employees, approximately 26.7% of whom were black; blacks represented 8.6% of the community labor force at that time. From the period 1970 through 1979, .7% of the community labor force were black managers and officials including salaried supervisors. During the same period of time from 5% to 13% of the defendant's work force was comprised of black managers and officials including salaried supervisors.

On July 12, 1978 plaintiff filed charges of discrimination with the Ohio Civil Rights Commission and the United States Equal Employment Opportunity Commission alleging that he had not been promoted to the position of Plant Superintendent because of his race. Plaintiff was a member of the affirmative action committee of defen-

dant. There is no evidence that plaintiff brought his complaint to the attention of this committee. Plaintiff filed his original complaint with this Court on November 15, 1978 alleging he had been discriminated against because of his race in violation of 42 U.S.C. §1981, 1988. In August, 1980 plaintiff filed a motion to amend his complaint to add a claim for violation of 42 U.S.C. §2000 (e). This motion was granted on September 5, 1980.

Plaintiff continued working with defendant as production manager. In May of 1979, Carol Cowell, an hourly employee, reported to Mr. Johnson an incident in which plaintiff allegedly had sexually harassed her. Mr. Johnson investigated this incident by talking with Carol Cowell and Beth Alexander, another hourly employee. When Carol Cowell indicated to Mr. Johnson that she did not wish to pursue the matter because plaintiff had apologized to her, Mr. Johnson did nothing further.

On November 22, 1980, plaintiff along with other management employees and a few hourly employees were cleaning at the Hill Avenue plant to prepare the plant to return to production on November 24, 1980. Hourly employees at the plant had been on strike through most of the month of November. November 22, 1980 was the date of the annual Ohio State-University of Michigan game. As one management employee, Frank Taylor, and two hourly employees, Bob Haas and Marty Carlo, were leaving the plant around 3:30 or 4:00, plaintiff yelled to Bob Haas that Mr. Haas owed him $5.00 from a bet on the game. Plaintiff followed these men out to the parking lot. Plaintiff then approached Mr. Haas and again asked for his money. Plaintiff grabbed Mr. Haas's clothing and pinned him up against Mr. Haas's car. Plaintiff then let Mr. Haas go. Three security guards who were on

the plant premises because of the strike observed the contact between plaintiff and Bob Haas. The security guards got out of the car where they were sitting and approached plaintiff and the other men. Plaintiff refused to give the security guards his name and went back into the plant.

Frank Taylor reported the incident to Mr. Johnson that weekend. Mr. Taylor and Mr. Haas also investigated the possibility of filing criminal charges against plaintiff because of the incident. Although plaintiff states he was "kidding around" when he grabbed Mr. Haas, Mr. Haas did not think plaintiff was "kidding around."

Mr. Johnson investigated the incident with Mr. Haas and decided to terminate plaintiff. The fact that plaintiff was black or that he had a lawsuit pending in this Court had no effect on Mr. Johnson's decision to terminate plaintiff. Plaintiff was terminated on December 1, 1980.

On May 26, 1981 plaintiff filed a charge affidavit with the Ohio Civil Rights Commission alleging he had been discharged in retaliation for having filed a previous charge with the Ohio Civil Rights Commission. On July 1, 1982 the Commission issued a notice of Commission Disposition finding no probable cause. Plaintiff also filed an amended complaint with this Court alleging he had been discharged on December 1, 1980 in retaliation for having filed his original complaint with the Ohio Civil Rights Commission.

Conclusions of Law

Plaintiff's action arises under 42 U.S.C. §2000(e) and 42 U.S.C. §1981. Under an action brought pursuant to 42 U.S.C. §1981, a plaintiff must show intent to discriminate. *Central Building Contractors Association, Inc. v.*

Pennsylvania, 50 U.S.L.W. 4975 (United States Supreme Court, June 29, 1982). Plaintiff introduced no evidence to establish intent to discriminate. Therefore, plaintiff's claims under 42 U.S.C. §1981 fails for lack of this proof.

In *McDonnell Douglas Corporation v. Green,* 411 U.S. 792 (1973) the Court states as follows regarding a complainant's burden of proof in a Title VII action:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

McDonnell Douglas Corporation v. Green, supra at 802. The Court also indicated differing factual situations might vary the specifications of proof for a prima facie case.

Once a plaintiff has established a prima facie case the burden of going forward with the evidence shifts to the defendant. Defendant must articulate some legitimate non-discriminatory reason for the employer's rejection. Plaintiff then must be given the opportunity to prove that the reason given by defendant was a pretext for discrimination. Despite the shift to defendant to articulate some legitimate non-discriminatory reasons, plaintiff retains the ultimate burden of persuasion. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

In a Title VII action involving charges that plaintiff was not promoted for discriminatory reasons, the defendant does not have to prove that defendant made the best decision to promote the person selected. Defendant only need prove that the decision to promote was not based upon impermissible considerations such as race. *Texas Department of Community Affairs v. Burdine, supra; Lieberman v. Gant,* 630 F.2d 60 (2d Cir. 1980); *Loeb v. Textron,* 600 F.2d 1003 (1st Cir. 1979). Personnel policies which take into account subjective factors are not unlawful absent a showing of desparate [sic] impact on minority groups. See *Bauer v. Bailar,* 647 F.2d 1037 (10th Cir. 1981).

Plaintiff has failed to prove a prima facie case of racial discrimination. Plaintiff failed to prove he was qualified for the position of plant superintendent. Even if plaintiff had established that he was qualified for the position of plant superintendent, the defendant articulated legitimate non-discriminatory reasons for choosing Mr. Kerner for the position. Mr. Johnson felt that Pete Kerner was the best qualified to hold the position of Plant Superintendent. The majority of management witnesses agreed with Mr. Johnson. Plaintiff failed to establish that the reasons Mr. Johnson gave for choosing Mr. Kerner were pretextual. Race was not a factor in Mr. Johnson's selection of Pete Kerner as plant superintendent.

In an action for retaliatory discharge brought pursuant to 42 U.S.C. §2000e-3(a) to establish a prima facie case a plaintiff must show:

> (1) that there was a statutorily protected participation, (2) that an adverse employment action occurred, and (3) that there was a causal link between the participation and the adverse employment action.

Whately v. Metropolitan Atlanta Rapid Transit, 632 F.2d 1325 (5th Cir. 1980) at 1328.

Regarding the causal link between the participation and the adverse employment action, in the area of retaliatory discharge of public employees for exercise of their First Amendment rights, in *Mt. Healthy City Bd. of Ed. v. Doyle,* 429 U.S. 274 (1977), the Supreme Court held a strict standard applies. A plaintiff must establish that his conduct is constitutionally protected and the conduct was a substantial or motivating factor in the employer's decision to terminate the employee. *Mt. Healthy City Bd. of Ed. v. Doyle, supra.* The employer must then prove that the employer would have reached the same decision even in the absence of the protected conduct. See *Mt. Healthy City Bd. of Ed. v. Doyle, supra.* In a later decision, *Givhan v. Western Line Consolidated School District,* 439 U.S. 410 (1979), the Court indicated a "but for" test applies.

The "but for" test has also been applied in employment discrimination cases. The burden of proof, however, always remains upon a plaintiff in a Title VII action, *Texas Department of Community Affairs v. Burdine, supra.* A majority of courts have held in a Title VII action that an employee who wishes to prove that he was fired in retaliation for having filed discrimination charges must prove that "but for" his having filed these charges, he would not have been terminated. See *Kauffman v. Sidereal Corporation,* 677 F.2d 767 (9th Cir. 1982). *DeAnda v. St. Joseph Hospital,* 671 F.2d 850 (5th Cir. 1982); *Jackson v. City of Killeen,* 654 F.2d 1181 (5th Cir. 1981); *Williams v. Boorstin,* 663 F.2d 109 (D.C. Cir. 1980); *Sherkow v. State of Wisconsin, Department of Public Instruction,* 630 F.2d 498 (7th Cir. 1980); *Womack v. Munson,* 619 F.2d 1292 (8th Cir. 1980); *Loeb v. Textron, Inc., supra.*

One other important factor to be considered in deciding whether there is a causal relationship between an employee's filing of a charge of discrimination and his subsequent discharge is the length of time between the two events. *Hochstadt v. Worcester Foundation For Experimental Biology,* 425 F. Supp. 318, 324 (D. Mass. 1976), aff'd. 545 F.2d 222 (1st Cir. 1976). Finally, an employee is not protected from discipline because he has filed a charge of discrimination. *Williams v. Boorstin, supra; Brown v. Ralston Purina Company,* 557 F.2d 570 (6th Cir. 1977); *Hochstadt v. Worchester* [sic] *Foundation, supra.*

Plaintiff has alleged that his discharge was in retaliation for his having filed discrimination charges. Plaintiff has failed to prove that he would not have been terminated for the incident with Haas but for his filing the discrimination charge. Plaintiff had been warned previously to never place his hands on an hourly employee. The Court declines to substitute its judgment for that of defendant in deciding whether defendant's decision to terminate plaintiff was the proper management decision. In addition, the court notes that the length of time between defendant's filing his discrimination charge on July 12, 1978 and his firing on December 1, 1980 makes it unlikely that the two incidents were casually [sic] related. Plaintiff would have been discharged for the altercation with Haas regardless of whether he had filed discrimination charges. Plaintiff is not protected from discipline by having filed discrimination charges.

Both plaintiff and defendant have attempted to use statistical evidence in support of their positions. The Court finds this statistical evidence to be of limited value. First, statistical evidence is not a determinative factor in an action brought by an individual for employment dis-

crimination. See *Harper v. Trans World Airlines, Inc.*, 525 F.2d 409 (8th Cir. 1975). Second, the small size of the sample makes this statistical evidence of questionable value. See *Williams v. Tallahassee Motors, Inc.*, 607 F.2d 689 (5th Cir. 1979). Finally, plaintiff was seeking the position of plant manager which called for particular qualifications. When a job requires particular qualifications, any statistical analysis must be limited to those individuals who possess these particular qualifications. See *Hazelwood School District v. United States*, 433 U.S. 299 (1977); *Metrocare v. Washington Metropolitan Area Transit Authority*, 679 F.2d 922 (D.C. Cir. 1982); *Williams v. Tallahassee Motors, Inc., supra.* Neither party presented statistical evidence of this nature.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that judgment be, and hereby is, entered in favor of defendant RKO Bottlers of Toledo, Inc. and against plaintiff John Jackson.

/s/ JOHN W. POTTER
United States District Judge

STATUTES INVOLVED

28 U.S.C. § 1331

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. § 1343

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. § 2201

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2202

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

42 U.S.C. § 1981

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1988

§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Supreme Court, U.S.
FILED
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CLERK

(8)

No. 85-1858

In the Supreme Court of the United States

October Term, 1985

JOHN JACKSON,
Petitioner,

vs.

PEPSI-COLA BOTTLERS OF TOLEDO, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Sixth Circuit Court of Appeals misapply the "clearly erroneous" standard in reviewing the decision of the trial court?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This action was originally commenced by a complaint, filed by petitioner, John Jackson, in the United States District Court for the Northern District of Ohio, Western Division, on November 15, 1978, alleging race-related employment discrimination (denial of promotion) in violation of 42 U.S.C. §§1981 and 1988. An answer was filed by respondent, RKO Bottlers of Toledo, Inc., on December 6, 1978, denying that it had discriminated against petitioner. On September 5, 1980, the District Court granted petitioner's motion to amend his complaint, by interlineation, to add an allegation of violation of 42 U.S.C.

§2000(e) *et seq.* as an additional basis of jurisdiction, as well as adding the fact that he had filed a complaint with the Equal Employment Opportunity Commission and had received a "right to sue letter".

On June 26, 1981, petitioner moved for leave to file an amended complaint in order to allege retaliation and to bring the suit as a class action. The District Court, on January 15, 1982, issued a memorandum and order denying petitioner leave to amend the complaint to bring the cause as a class action. The Court sustained the motion to state a claim under 42 U.S.C. §2000(e)-(3)(a). An amended complaint was filed on January 21, 1982, and was answered on February 1, 1982.

Respondent moved, on August 9, 1982, to dismiss the claim of retaliation on the grounds that no right to sue letter had been received. Petitioner then moved for leave to file an amended complaint, alleging that a right to sue letter had been received from the Equal Employment Opportunity Commission. The District Court, on September 3, 1982, found respondent's motion to dismiss to be moot.

The third amended complaint was filed by petitioner on September 1, 1982, and an answer was filed by respondent on September 13, 1982. A trial to the court commenced on September 28, 1982, and continued on September 29 and 30, October 1, 5, 6, and October 13, 14, and 15, 1982, with sixteen witnesses giving extensive testimony. Proposed findings of fact and conclusions of law were filed by both parties, and, on November 15, 1982, the District Court entered judgment in favor of respondent, finding that petitioner had not been denied a promotion due to his race or discharged from his employment in retaliation for having filed charges of race discrimination.

Petitioner appealed the decision of the District Court and the issues were briefed and argued before the United States Court of Appeals for the Sixth Circuit. That Court issued an opinion, on August 30, 1984, reversing the judgment of the District Court and remanding for further proceedings. The Court of Appeals found that the District Court had committed error on the issue of whether the petitioner had presented prima facie evidence of discrimination and retaliation. The Appellate Court could not judge, from the District Court's opinion, whether the inferences that can be drawn from a prima facie case had been properly considered at the next stage of the process. *Jackson v. RKO Bottlers of Toledo,* 743 F.2d 370, 377, 378 (6th Cir., 1984); Petitioner's Appendix (hereinafter referred to as App.), A49.

Following remand to the District Court, petitioner moved for a new trial and reassignment to a different judge, and, in the alternative, requested leave to submit newly-discovered evidence. The motion was opposed by respondent and the District Court denied the motion, by order dated February 5, 1985. The Court stated that it would be able to fairly review the trial record and found that the evidence which petitioner sought to introduce was not sufficiently probative to warrant the reopening of the case. App., A36-37.

Proposed findings of fact and conclusions of law were submitted by both parties to the District Court which ruled, on February 27, 1985, that judgment would be entered in favor of respondent. Petitioner, on March 18, 1985, again appealed the decision of the District Court to the Sixth Circuit Court of Appeals. The issues were briefed and argued and the Court of Appeals issued an opinion, on February 10, 1986, affirming the decision of the District Court in favor of respondent. The Court

of Appeals found that, despite petitioner's having shown a prima facie case on both the promotion and retaliation issues, the District Court's findings that the respondent had shown legitimate, non-pretextual reasons on both issues, which had not been rebutted, were not clearly erroneous. *Jackson v. Pepsi-Cola, Dr. Pepper Bottling Co.*, 783 F.2d 50, 51-52 (6th Cir., 1986); App., A1, A3. This petition followed.

ARGUMENT

I. THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY APPLIED THE "CLEARLY ERRONEOUS" STANDARD OF FEDERAL RULE OF CIVIL PROCEDURE 52(a) IN CONSIDERING AND AFFIRMING THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Petitioner alleges that the Sixth Circuit Court of Appeals misapplied the "clearly erroneous" standard in its second decision on this case, *Jackson v. Pepsi-Cola, Dr. Pepper Bottling Co.*, 783 F.2d 50 (6th Cir., 1986); App., A1, because the Court, in "reviewing the same facts and result which it had earlier determined were 'clearly erroneous', subsequently found both the [District] Court's characterization and decision appropriate to affirm." Petitioner's Brief, p. 4. This argument is incorrect because the issues reached by the Court of Appeals in the first decision, *Jackson v. RKO Bottlers of Toledo*, 743 F.2d 370 (6th Cir., 1984); App., A38, were different from those decided in the aforementioned, subsequent decision.

It is well established that there is an accepted pattern for the allocation of proof in employment discrimination and retaliation cases. According to *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), the complainant has the initial burden of establishing a prima facie case of discrimination, and he must establish, by a preponderance of the evidence, facts, that if not explained, prove or give rise to an inference of unlawful discrimination. If the complainant successfully establishes a prima facie case, the burden is then upon the defendant to articulate some legitimate nondiscriminatory reason for its actions. *McDonnell Douglas Corp. v. Green, supra,* 411 U.S. at 802; *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981); *Albemarle Paper Company v. Moody,* 422 U.S. 405 (1974). If the defendant articulates such a reason, plaintiff may then only prevail by showing that the nondiscriminatory reason articulated was a mere pretext for the discriminatory action. Although the burden of going forward with the evidence may shift between the plaintiff and the defendant, the burden of persuasion always remains on the plaintiff. *Jackson v. RKO Bottlers of Toledo, supra,* 743 F.2d at 375; App., A45; *Haynes v. Miller,* 669 F.2d 1125, 1126 (6th Cir., 1982). Addressing the issue of retaliation, to support a claim of retaliatory discharge, plaintiff must establish: (1) that he opposed practices made unlawful by Title VII; (2) this activity was statutorily protected; (3) that he was the subject of adverse employment action; and (4) that there exists a causal link between this protected activity and the adverse action of his employer. *See, Jackson v. RKO Bottlers of Toledo, supra,* 743 F.2d at 375; App., A46. As to the latter requirement, the Court must consider whether the discharge would have occurred anyway had there been no protected activity, which is commonly referred to as the

"but for" test. *Mount Healthy City School District Board of Education v. Dole*, 429 U.S. 274 (1977); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). This issue, just as in the discrimination issue, turns on whether the employer annunciates a legitimate business reason for terminating the employee and whether the plaintiff is able to show that the annunciated reason was merely pretextual.

The Court of Appeals, in its first decision dealt with only one-half of each equation. The Court found that the District Court had committed error on the issue of whether the plaintiff had presented prima facie evidence of discrimination and retaliation. The Court of Appeals, however, could not judge, from the District Court's opinion, whether the inferences that can be drawn from a prima facie case had been properly considered at the next stage of the process, that is, whether the employer annunciated legitimate reasons for its action which were not pretextual. *Jackson v. RKO Bottlers of Toledo, supra*, 743 F.2d at 377, 378; App., A51-52. The Court of Appeals stated that:

> "[T]he district court failed to recognize that Jackson had made a prima facie case, with respect to both his Title VII claims and §1981 claim. This distorted its fact-finding process in determining whether the defendant articulated a non-discriminatory reason sufficient to rebut the inference of discriminatory intent the plaintiff had established." *Jackson v. RKO Bottlers of Toledo, supra*, 743 F.2d at 379; App., A55.

The Court also stated that:

> "We cannot be assured that the plaintiff's attempt to demonstrate pretext was fairly considered when the trial court did not acknowledge plaintiff's prima facie

> case of retaliatory discharge. The plaintiff may have lost his case at trial because the district court erred in failing to recognize his prima facie case." *Jackson v. RKO Bottlers of Toledo, supra,* 743 F.2d at 378; App., A52.

The Court of Appeals, citing *Pullman-Standard v. Swint,* 456 U.S. 273 (1982), remanded the case to the District Court for consideration of these issues, in light of the conclusion that plaintiff had established a prima facie case. It bears repeating that the Court of Appeals itself did not reach the next level of consideration.

The District Court, having pointed out that it had "heard extensive testimony over the course of the nine day trial", App., A32, declared that it could fairly review the trial record in light of the Court of Appeals' decision. App., A36. The District Court proceeded to re-examine the record and ruled in favor of respondent. The Court stated that:

> "Plaintiff satisfied his burden of presenting a prima facie case of discrimination in defendant's decision to not promote him to the position of plant superintendent. The defendant has articulated legitimate non-discriminatory reasons for his rejection, thus rebutting plaintiff's prima facie case. Plaintiff has failed to prove, by a preponderance of the evidence, that the reasons articulated by defendant were pretextual. Defendant's decision . . . was not based in any degree upon plaintiff's race . . . ." App., A29.

The Court, on the retaliation issue, stated that:

> "Plaintiff alleged that his discharge from employment with defendant was in retaliation for his having filed this action and/or a discrimination charge. Plaintiff

established a prima facie case of retaliation. Defendant articulated a legitimate nondiscriminatory reason for the discharge, to wit: that plaintiff had engaged in conduct unacceptable for a supervisor after having been previously warned concerning such conduct prior to his having filed discrimination charges. Plaintiff remained in the second highest plant position for more than two years and four months prior to the incident which led to termination. The court is not persuaded by plaintiff's testimony that he was the victim of disparate treatment during that lengthy period. Neither plaintiff's lawsuit nor his charge of discrimination played any part, nor were they substantial or principal factors, in his discharge. Plaintiff would have been discharged regardless of the charges filed with the governmental agencies or this court." App., A29.

The Court of Appeals, now being satisfied that the District Court had applied the correct standard and that petitioner had been given the benefit of the inferences raised by showing a prima facie case, found that the District Court's findings of fact, at the second level of consideration, were not clearly erroneous. The Court stated, on the promotion issue, that:

> "Plaintiff failed to prove that the reasons articulated by defendant were pretextual." *Jackson v. Pepsi-Cola, Dr. Pepper Bottling Co., supra,* 783 F.2d at 54; App., A8.

As to the retaliation issue, the Court stated:

> "Plaintiff has failed to produce any credible evidence that this legitimate reason for his termination was mere pretext." *Jackson v. Pepsi-Cola, Dr. Pepper Bottling Co., supra,* 783 F.2d at 54; App., A9.

The Court of Appeals obviously recognized that the evidence, upon which the resolution of the issues had to be founded, was testimonial in nature, the District Court having heard and observed some sixteen witnesses, and the Court was unable to state that the District Court's decisions, in weighing that testimony and judging the credibility and demeanor of the witnesses, was clearly erroneous.

Petitioner cites this Court's decision in *Anderson v. Bessemer City,* ..... U.S. ....., 53 U.S.L.W. 4314 (March 19, 1985), as providing support for their position that the Sixth Circuit did not correctly apply the clearly erroneous standard. We are unable to discern such support from that opinion and, indeed, we believe that the Court of Appeals' decision is in complete agreement with that case. This Court stated, in that decision, that:

> "Although the meaning of the phrase 'clearly erroneous' is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles . . . is that 'a finding is' clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. . . . This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there

are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. . . .

. . . Rule 52 . . . states straightforwardly that 'findings of fact shall not be set aside unless clearly erroneous.' That the Rule goes on to emphasize the special deference to be paid credibility determinations does not alter its clear command: Rule 52 'does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous.'. . .

The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. . . . In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. . . . For these reasons, review of factual findings under the clearly-erroneous standard—with its deference to the trier of fact—is the rule, not the exception.

When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations and demeanor and tone of voice that bears so heavily on the listener's understanding of and belief in what is said. . . . [W]hen a trial judge's finding is based on his decision to credit the testimony of one of two

> or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson v. Bessemer City,* ..... U.S. ....., 53 U.S.L.W. 4314, 4317 (March 19, 1985). (citations omitted).

We respectfully suggest that the Court of Appeals precisely followed the foregoing precepts. Here, despite the District Court's error on the prima facie issue, the factual inquiry proceeded to "a new level of specificity", *U.S. Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 715 (1983), and the Court of Appeals, having reviewed the record, was unable to find basis for concluding that the District Court's findings were clearly erroneous. The standard was properly applied, and the Court of Appeals was correct in giving the appropriate deference to the trier of fact.

CONCLUSION

Respondent respectfully requests that this Court deny the petition for a writ of certiorari. The clearly erroneous standard was applied in conformity with the decisions of this Court and the decision of the District Court and the Court of Appeals should be allowed to stand.

Respectfully submitted,

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